Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Cross-Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DFW Airport – like most airports – enters into bargained-for, comprehensive "use agreements" with airlines using its facilities. In exchange for long-term terminal leases, reduced lease rates, and fuel and landing-fee discounts, the signatory airlines agree to serve the Dallas/Fort Worth area exclusively from DFW. Under these facts:

- Does the Fifth Circuit's holding that the exclusivity provision in DFW's use agreement is preempted by the Airline Deregulation Act conflict with this Court's precedent providing that the ADA does not preempt voluntary, self-imposed contracts?

- Does one 38-word sentence in the 100-page use agreements, referring to the 1968 Bond Ordinance passed to finance DFW's construction, convert those agreements into an attempt at local regulation of air service, thereby preempting the exclusivity provision under the Airline Deregulation Act?

2. The Fifth Circuit upheld DOT's interpretation that the Wright Amendment's commuter airlines exception allows single-ticket service from Love Field to points beyond the Love Field Service Area, *if* a first leg is flown intrastate on a 56-seat aircraft that then connects at a Texas airport for a second-leg, interstate flight. Does the Fifth Circuit's holding conflict with the D.C. Circuit's view that Congress intended to keep Love Field a short-haul airport?

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CROSS-PETITION FOR A WRIT OF CERTIORARI

The Dallas-Fort Worth International Airport Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported, but is reproduced at Appendix A to the Petition for Writ of Certiorari previously filed by the City of Fort Worth. (FW Pet.App. 1). The declaratory and procedural opinions of the United States Department of Transportation are unreported, but are reproduced at Appendices B (FW Pet.App. 53) and C (FW Pet.App. 147), respectively, to Fort Worth's Petition for a Writ of Certiorari.

JURISDICTION

The Fifth Circuit Court of Appeals entered its judgment on February 1, 2000, and issued a revised opinion on February 24, 2000 (FW Pet.App. 1). No petition for rehearing has been filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Airline Deregulation Act. The pertinent portions of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b), provide:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

The Wright Amendment. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29 (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft

with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The Shelby Amendment. Sections 337(a) and (b) of the Department of Transportation and Related Agencies

Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

> SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

STATEMENT OF THE CASE

This case will shape the future of DFW Airport – currently the world's fifth busiest airport. If the Department of Transportation's orders are upheld, then a linchpin term of DFW Airport's use agreements – the contracts negotiated between an airport and the airlines using its facilities – may be ignored on the pretext that the agreement acts as a local law regulating air commerce and is therefore subject to preemption by federal law.

The signatory airlines that enter use agreements with DFW Airport receive substantial benefits over the other non-signing airlines that use DFW; DFW, in turn, receives

as consideration the airline's pledge to serve the Dallas-Fort Worth area exclusively from DFW – a not insubstantial promise when millions of dollars of bonds to finance airport expansion are involved. DFW relies on fees paid by its signatory airlines – which have pledged to use DFW's facilities exclusively – to pay for the DFW's costs of operation and debt service.

The DOT's orders that were affirmed by the Fifth Circuit wrongly remove from the contractual equation the commitment to concentrate an airline's services at DFW. DOT views the airport's acceptance of this bargained-for promise as an improper local regulation of an airline's affairs. Can DFW and other United States airports rely – like any other party to a contract – on the promises willingly made by its air carriers in a privately ordered agreement?

DFW Airport is also under assault by the DOT's new interpretation of some of the original protections of the 1979 Wright Amendment that were previously upheld by the D.C. Circuit in a 1988 opinion.[1] The Department's new-found interpretation essentially rewrites the Wright Amendment to sanction so-called "through service," which opens Love Field to single-ticket interstate service far beyond the limits originally intended and set by Congress. To borrow a phrase from Continental Airline's advertisement, if DOT's interpretation is adopted, Love Field is now opened "to the World."

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[1] *Continental Airlines, Inc. v. DOT*, 843 F.2d 1444, 1454 (D.C. Cir. 1988).

I. The Federal Nudge.

For almost as long as there has been commercial air traffic, the cities of Dallas and Fort Worth have fought the contemporary equivalent of a prairie war. Dallas' Love Field was a mere 12 miles to the east of Fort Worth's Greater Southwest International Airport – a proximity that produced "unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities."[2] In 1961 the federal government undertook to remedy the situation with what courts have called "more than a gentle nudge."[3]

By 1964, the Civil Aeronautics Board concluded that "service to Dallas and Fort Worth should be required through a single airport which meets . . . the present and future requirements for trans-continental cargo and passenger services."[4] The CAB gave the parties 180 days to arrive at a "voluntary agreement" regarding "the *location* of the airport to be used for the consolidated service. . . . "[5] When disagreement persisted, CAB

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[2] *City of Dallas v. Southwest Airlines*, 371 F.Supp. 1015, 1019 (N.D. Tex. 1973), aff'd on other grounds, 494 F.2d 773 (5th Cir. 1974).

[3] *City of Dallas v. Continental Airlines, Inc.*, 735 S.W.2d 496, 497 (Tex. App. – Dallas 1987, writ denied).

[4] Initial Decision of Judge Katherine A. Kent, Part II, 81 C.A.B. 798, 816, 1979 WL 21406-16 (1979). Cross-Pet.App. at 57 Judge Kent's decision provides a thorough discussion of the background of this controversy, including the development of DFW Airport, and the legislative history and purpose of the Wright Amendment [Cross-Pet.App. at 51-101].

[5] *Id.* (emphasis added).

determined that it should "assist" the Cities in reaching their voluntary agreement.[6]

The cities were finally pushed to agreement by the fall of 1968, and enacted the 1968 Regional Airport Concurrent Bond Ordinance to finance construction of DFW.[7] Essentially the two arch-rivals agreed to adopt " 'covenants against competition' in which each agreed, in pursuance of their common purpose, to put aside plans to compete with each other by promoting scheduled service at their solely-owned municipal airports. . . . "[8]

The Cities acknowledged in Section 9.5A of the 1968 Bond Ordinance that Love Field, as well as the other area airports, was "potentially competitive" with DFW.[9] The Cities thus agreed in Section 9.5 to phase out Certificated Air Carrier passenger service (an industry term signifying, in this context, interstate service) from their respective local airports, to transfer those services to DFW Airport, and to refrain from any future acts or policies that would be "competitive with or in opposition to the optimum use and development of [DFW Airport]."[10]

In early 1970, the eight CAB-certified (that is, interstate) air carriers then serving the Dallas-Fort Worth area executed Letters of Agreement with the DFW Regional Board. Each signatory airline agreed to "move all of its Certificated Air Carrier Services serving the Dallas-Fort Worth area to the [DFW Airport] . . . to the extent

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[6] *Id.* at Cross-Pet.App. 58.

[7] FW Pet.App. 58-60.

[8] *Kent Decision* at Cross-Pet.App. 61.

[9] FW Pet.App. 59.

[10] *Id.*

required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance."[11] Identical language was included in subsequent Use Agreements signed by each of those airlines, and at midnight on January 13, 1974 – more than twelve years after CAB's nudge began – the major air carriers moved to DFW.[12] Fort Worth immediately closed GSIA, but Love Field remained open.[13]

II. The Love Field Legislation.

Southwest Airlines refused to leave Love Field when the major carriers relocated to DFW Airport. Because Southwest offered only intrastate services, it was exempt from federal laws governing interstate airline operation and thereby avoided inclusion under section 9.5A of the 1968 Bond Ordinance.[14]

When Congress passed the Airline Deregulation Act in 1978, Southwest obtained authority (under an unusual, but short-lived provision of the new law) to start service between New Orleans and Love Field.[15] At the specter of restored interstate service from Love Field and the revival of the hostilities between the prairie-warrior Cities,

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[11] *City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. at 1020-21 & n.1.

[12] *See City of Dallas v. Continental Airlines, Inc.*, 735 S.W.2d at 498.

[13] *See City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773, 775 (5th Cir. 1974).

[14] *Id.* at 777. Southwest was regulated by the Texas Aeronautic Commission, but not as a CAB-certified carrier.

[15] *See Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991) (discussing history of Wright Amendment).

House Speaker Jim Wright introduced legislation prohibiting *all* interstate service at Love Field.

Without a comparable Senate bill, the Conference Committee recommended a compromise to which, as the Fifth Circuit has observed, Southwest Airlines, Fort Worth, Dallas, DFW and all related constituent groups agreed.[16] It was that compromise agreement that was embodied in the Wright Amendment, as ultimately enacted.[17] The Wright Amendment was intended as a "fair and equitable settlement" to implement the agreement between Fort Worth and Dallas by "reducing interstate travel from Love Field," as necessary to benefit the region's travelers.[18]

The Wright Amendment[19] prohibited the CAB (and any successor agency) from issuing a certificate to an airline for interstate air service to or from Love Field, except for flights between Love Field and points in the four states contiguous to Texas on a "turn-around" basis only; the CAB could not allow carriers to advertise or sell through service on a single ticket between Love Field and points beyond those contiguous states. The Wright Amendment contained two other exceptions: (1) charter flights not to exceed ten flights per month; and, (2) "commuter airlines" operating aircraft with a capacity of 56 seats or fewer.

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[16] *See Cramer*, 931 F.2d at 1034.

[17] *Id.* at 1023.

[18] *Id.* at 1034.

[19] Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980).

The "Shelby Amendment" was passed in 1997 (as a rider to an appropriations bill) adding three more states to the four-state perimeter: Kansas, Mississippi and Alabama. That measure also amended the commuter airline exception to include aircraft weighing less than 300,000 pounds that are "reconfigured" to accommodate 56 or fewer passengers.[20]

III. The Proceedings Below.

In October 1997, Fort Worth sued Dallas, DFW Airport, and Legend Airlines in Texas state court asking for a declaration that the 1968 Bond Ordinance obligated Dallas to continue to restrict interstate air service at Love Field to short-haul service within Texas and the four contiguous states.

Continental Airlines, Inc., and its wholly-owned subsidiary Continental Express, Inc. (collectively "Continental") then demonstrated the need for more than declaratory relief by announcing their joint plans for nonstop service from Love Field to Cleveland, advertising flights from "Love to the World."[21] Fort Worth and DFW added Continental to the litigation. DFW sued Continental for a determination that its use agreement with "Continental Airlines" obligated Continental to provide all interstate services for the Dallas-Fort Worth area from DFW.

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[20] Section 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997).

[21] FW Pet.App. 48.

The Department of Transportation watched from the sidelines for almost a year as the state litigation progressed. On August 25, 1998 – at the urging of Legend Airlines and Continental – DOT observed that the litigation was proceeding without benefit of its views and instituted its own Interpretation Proceeding for the professed purpose of "helping" the parties resolve the pending litigation.[22]

By October 1998, the Texas state court heard motions for summary judgment and, on December 16, entered final judgment concluding that Dallas was obligated to prohibit interstate passenger service to or from Love Field to points beyond the four contiguous states. Legend, Continental and Dallas appealed the final judgment to the intermediate state appellate court. The Texas intermediate appellate court stayed its review of the state-court judgment pending the Fifth Circuit's decision, but has now lifted its stay.

Six days after the state court entered final judgment, the Department issued its Declaratory Order, making rulings (on what it called the "federal law issues") that were directly contrary to the state court's rulings on essentially the same issues.[23]

DFW Airport and the City of Fort Worth petitioned the Fifth Circuit under 49 U.S.C. § 46110 to review all of DOT'S findings, while other parties (including Southwest Airlines, which was not a party to the state court litigation) sought review of a portion of the DOT order. The Fifth Circuit issued its opinion denying the petitions for

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[22] FW Pet.App. 8, 16 n.5.

[23] FW Pet.App. 8-9, 16 n.5, 53.

review and affirming DOT's order on February 1, 2000, and issued a revised opinion on February 24, 2000.

The City of Fort Worth filed its Petition for a Writ of Certiorari on March 3, 2000, and DFW Airport now files its cross-petition.

REASONS FOR GRANTING THE WRIT

DFW Airport's writ should be granted for three reasons, the first two of which are interrelated and will thus be discussed together:

Reason One: **The Fifth Circuit's decision conflicts with this Court's decision in *American Airlines, Inc. v. Wolens*.**

Reason Two: **Every major airport in the United States must know whether bargained-for provisions in their existing use agreements affecting airlines' services bind the air carriers using its facilities.**

With very few exceptions, every airport in the United States requires contracts – commonly called use agreements – with airlines using its runways, gates, and other facilities. Use agreements are obviously not state laws subject to federal preemption, but instead are arms-length business transactions voluntarily made, and from which both parties receive substantial benefits – including, in the case of the signatory airlines at DFW Airport,

long-term terminal leases, reduced lease rates, fuel discounts, and landing-fee discounts.[24] Among its contractual benefits, DFW receives the signatory airline's agreement to serve the Dallas-Fort Worth area exclusively from DFW.[25]

The holding in *Wolens*

The Department of Transportation reads the use-agreement provision that restricts a signatory airline from using another airport to serve the same metropolitan area as a local *regulation* "related to a price, route, or service of an air carrier," something prohibited by the express-preemption provisions of the ADA.[26] The Fifth Circuit agreed. But, the Fifth Circuit's concurrence with DOT's view directly conflicts with this Court's decision in *American Airlines, Inc. v. Wolens*[27] and calls into question the bargained-for provisions regarding airline services in use agreements made by major airports throughout the nation.

This Court concluded in *Wolens* that voluntary, self-imposed contracts are not preempted by the ADA. While acknowledging that breach-of-contract claims against American Airlines (based on alleged problems with its frequent-flyer program) affected "rates, routes and services," this Court found against federal preemption because the terms of a contract are "privately ordered

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[24] *See* FW Pet.App. 139; Cross-Pet.App. 1-8.

[25] Cross-Pet.App. 9.

[26] 49 U.S.C. § 41713(b)(1).

[27] *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995).

obligations," and are not essentially the same as a state's "enact[ment] or enforce[ment] of any law, rule, regulation or other provision having the force and effect of law."[28]

Relying on basic tenets of contract law, this Court concluded that it could:

> not read the ADA's preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings.[29]

The "state" as a contracting party

The Fifth Circuit summarily dismissed DFW's invocation of *Wolens* with a footnote, suggesting that *Wolens* is distinguishable because neither of the contracting parties there was "a state" – presumably a reference to the quasi-governmental DFW Airport Board. Notably, the Fifth Circuit provided no authority for its conclusory dismissal of *Wolens*. Moreover, no logical or legal distinction – and certainly nothing in the *Wolens* opinion itself – suggests that an airline's self-imposed obligations made to a governmental entity are less worthy of enforcement than those made to a private person or business. The bedrock principles of contract law that this Court called upon in *Wolens* should apply equally to all parties to a contract, whether those parties are public, private, or both.

Indeed, there are other well-reasoned decisions – consistent with *Wolens* – where one of the contracting

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[28] *Id.*

[29] *Id.*

parties was, in fact, a governmental entity.[30] In *Associated General Contractors v. Metropolitan Water District*,[31] a California regional water authority negotiated project labor agreements ("PLAs") with various unions representing contractors hired to work on a water improvement project. A clause in the PLAs required that all contractors working on the project participate in certain designated employee-benefit funds.[32]

Holding that the PLAs were not state "laws" subject to ERISA preemption but "mere[ly] negotiated contract provisions demanded [by the state] for certain projects," the Ninth Circuit first observed that ERISA's definition of "state laws" excludes state action that lacks the effect of law. As a result, ERISA, "does not preempt state law which relates to an ERISA plan so long as the state action does not have the effect of law."[33] The distinction drawn by the Ninth Circuit is thus an eminently reasonable one: "Where the state merely acts as any private party might act, instead of in areas where it exercises lawmaking or law enforcement authority, ERISA preemption does not come into play."[34]

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[30] *See Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) ("[w]hen we say that the NLRA preempts state law, we mean that the NLRA prevents a State from regulating within a protected zone. . . . A state does not regulate, however, simply by acting within [that zone].").

[31] 159 F.3d 1178 (9th Cir. 1998).

[32] *Id.* at 1179-1180.

[33] *Id.* at 1182 (quoting *Minnesota Chapter of Associated Builders & Contractors, Inc. v. County of St. Louis*, 825 F.Supp. 238, 245 (D. Minn. 1993)) (emphasis added).

[34] *Id.*

If this distinction is recognized in the ERISA field, it applies even more pointedly to the Airline Deregulation Act. As this Court noted in *Wolens*, the ADA "contrasts markedly" with ERISA, which creates a comprehensive scheme of dispute resolution channeling disputes into federal court.[35] In contrast, when Congress deregulated the airline industry it expressed "no intention to establish, simultaneously, a new administrative process for DOT adjudication of contract disputes," nor did it intend to funnel contract disputes into federal courts.[36]

And this Court has also embraced the distinction between state "regulations" and permissible, nonregulatory activity in the context of the preemptive scope of the National Labor Relations Act.[37] In *Building & Construction Trades Council v. Associated Builders & Contractors*, the Court held that the labor compact in question was not a government "regulation," noting that though the NLRA preempts a state from "regulating within a protected zone," a state "does not regulate . . . simply by acting within" that protected zone.[38] The Court followed with a statement that squarely applies here: "When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines only apply to State regulation."[39]

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[35] 513 U.S. at 232.

[36] *Id.*

[37] 29 U.S.C. § 151 *et seq.*

[38] 507 U.S. 218, 226-227 (1993).

[39] *Id.*

This unremarkable principle was not newly minted in 1993, the year *Building & Construction Trades Council* was decided: "Our decisions in this area support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor."[40]

The same rationale fits here: the quasi-governmental DFW Airport Board, by entering into use agreements with airlines at DFW Airport, was simply "interacting with private participants in the marketplace."

The scope of the use agreements

Rather than squarely addressing *Wolens*, the Fifth Circuit employed – in a curious way – its own analytical method from *Cardinal Towing Auto Repair, Inc. v. City of Bedford*.[41] The court's reference to *Cardinal Towing* is not surprising because that opinion accurately recounts the rule that courts, when asked to review a local government contract for possible preemption, *should look to the scope of the contract* for the activity it covers to determine whether it is a permissible proprietary action or an impermissible attempt to regulate. But it *is* surprising that the Fifth Circuit would mention *Cardinal Towing* and then fail to heed its directive to review the scope of the DFW use agreements in their entirety.

Rather than seeing the 100-page use agreement for the exhaustively comprehensive agreement that it is, the

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[40] *Id.*

[41] 180 F.3d 686 (5th Cir. 1999).

Fifth Circuit narrowly focused on a single sentence in the agreement in summarily concluding that the contracts "were enacted to effect the [1968 Bond] Ordinance." For such a leap, the Court looked solely to the presence in the use agreement of the following 38-word sentence:

> Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.[42]

A single reference to the 1968 Bond Ordinance in this one sentence of a densely detailed contract cannot and does not convert DFW's use agreement to an act of government regulation. Merely referencing an ordinance in a contract does not render the contract and the ordinance co-extensive – it simply makes the language of the ordinance one out of many contract terms. If properly examined in the way prescribed by *Cardinal Towing*, the use agreements are exponentially more than a mere overlap of the 1968 Bond Ordinance.

The Fifth Circuit, like the Department, latched on to the mistaken notion that if the Bond Ordinance provisions are preempted, then Section 3.2 of the agreement (quoted above) must automatically be preempted as well. But, parties routinely use portions of a statute to define their relationship without bringing the full weight of the statute into the bargain.[43] When a contract refers to or defines certain obligations that are described in a law –

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[42] FW Pet.App. 9.

[43] *Craddock Internat'l Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095, 1107-08 (5th Cir. 1997).

like the reference to the terms of the 1968 Bond Ordinance – the text of the statute does become part of the agreement.[44] The law or ordinance "does not have 'statute rank'; rather, it is merely a part of the contract, a term like any other."[45] Only the statutory terms apply, not judicial determinations of the statute's validity or application.[46] Thus even if the Bond Ordinance itself is preempted (a point DFW does not concede), the mere reference to the ordinance does not cause preemption of the use agreement between DFW and the signatory airline.

This case gave the Fifth Circuit an opportunity to apply a *Cardinal Towing* analysis to the scope of DFW's use agreements. Failing to do so led to the wrong conclusion that the contracts were an exercise in regulation, which led inexorably to the equally wrong notion that the use agreement is not a "privately ordered obligation." The result is a Fifth Circuit opinion – on a far-reaching issue of nationwide importance – that is the polar opposite of this Court's holding in *Wolens*.

By adopting the DOT's findings, the Fifth Circuit has made it difficult, if not impossible, for airports and the airlines using them to craft nonregulatory, proprietary

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[44] *Overton v. City of Houston*, 564 S.W.2d 400, 403 (Tex. Civ. App. – Houston [1st Dist.] 1978, writ ref'd n.r.e.).

[45] *Craddock*, 116 F.3d at 1107 (quoting *Commonwealth Petrochemicals, Inc. v. S/S Puerto Rico*, 607 F.2d 322, 325 (4th Cir. 1979)) (reversing trial court's interpretation that incorporation of statute "activated" statute – once incorporated, it is a term like any other); *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277, 1280 (5th Cir. 1982) (same).

[46] *See Craddock*, 116 F.3d at 1107.

contracts reflecting the circumstances unique to an airport such as DFW. Though an agency's interpretation may in the appropriate case be entitled to some deference, that deference cannot extend to a wholesale dismantling of arms-length transactions.

DFW Airport now faces the unsettling prospect of having an essential provision in its use agreements nullified – a bad enough prospect in the ordinary scheme of things, but one made far worse by its having been imposed on DFW by an agency and a circuit court that have flatly misinterpreted governing law. If the Fifth Circuit's decision stands, airports might just as well ask the DOT to write their contracts for them – by federal fiat.

Reason Three: Because of the conflict between the Fifth Circuit's and the D.C. Circuit's interpretation of the Wright Amendment, this Court should provide a definitive interpretation of the Amendment's "through-ticketing" provisions that is reasonable and consistent with Congress' intent to maintain Love Field as a short-haul facility.

The Wright Amendment forbids DOT from authorizing the advertising and sale of flights between Love Field and any point outside Texas. Two key exceptions to this general prohibition are now relevant.

- commuter airlines with aircraft seating fewer than 57 passengers – subsection (a)(2)
- flights to the four states contiguous to Texas – subsection (c)

The loophole repaired

The exception in subsection (c) that permits service to the four contiguous states (expanded by the Shelby Amendment to include three more states) has a caveat that closes an obvious loophole. Subsection (c) permits flights with any size aircraft – as long as (as pertinent here) "such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such state."

Without this so-called through-service or through-ticketing prohibition a passenger could board a full-size aircraft at Love Field and fly through, on one ticket, to any destination – U.S. or worldwide – merely by making a brief stop in one of the specified perimeter states. With through service on one ticket, Love Field would have remained a long-haul service airport essentially indistinguishable from DFW – the regional airport mandated by CAB.

The Department's view: the exception swallows the rule

Consistent with what the statute says, DOT ruled, in its 1985 *Love Field Amendment Proceeding*, that an air carrier may not advertise or sell service from Love Field to any destination beyond the contiguous-states perimeter. Relying on the Wright Amendment Conference Report, DOT told Continental Airlines (which like all airlines in 1985 possessed no regional jets with fewer than 57 seats) that it could not "evade" the restrictions of the Wright Amendment by:

> providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the

> five state area . . . [I]n our view, an air carrier providing interstate service within the authorized four-state service area may provide intrastate service from Love Field . . . however, the carrier cannot offer, promote or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.[47]

In upholding the DOT's interpretation of the Wright Amendment, the D.C. Circuit found in *Continental Air Lines v. Department of Transportation* that the " . . . DOT's interpretation is consistent with the purpose of the Amendment to limit Love Field to short-haul service."[48]

Ten years later, in September, 1998, however, Continental Airlines did precisely what the D.C. Circuit said it could not do, by advertising and offering service from "Love Field to the World" with "more than 190 destinations [in] 38 countries."[49] The only difference from 10 years earlier is the size of the plane on the *first segment* of the through flight – the second, long-haul leg was and is still flown on a large jet. Under its plan, Continental would operate short-haul flights with small, regional jets to its Houston hub where its passengers would then connect with larger jets – also operated by Continental – for flights to other U.S. cities, many of which are beyond the contiguous-state perimeter. Continental's new scheme

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[47] *Love Field Amendment Proceeding*, DOT Order 85-12-81, 1985 WL 57886 (1965). Cross-Pet.App. 10-21.

[48] 843 F.2d 1444, 1454-55 (D.C. Cir. 1988).

[49] *Id.* at Cross-Pet.App. 19-20.

was hardly the short-haul service contemplated by the Wright Amendment.[50]

Flatly contrary to its 1985 ruling, DOT now sanctions Continental's long-haul through service, deciding that:

> "any airline may offer through service between Love Field and another point to passengers using a flight between Love Field and another point within Texas operated under" the commuter airlines exception in subsection (a) of the Wright Amendment.[51]

DOT's new interpretation is based on the mistaken idea that the commuter-airline exception exempts planes with a passenger capacity of fewer than 57 seats from *all* restrictions of the Wright Amendment, including the through-ticketing prohibitions in subsection (c)(2). DOT reasons that because there is an express restriction on through service on large jets, but no similar restriction on commuter planes, Congress must have intended "to permit small aircraft to fly without such a restriction."[52]

DOT's interpretation necessarily assumes that Congress acted irrationally. Why would Congress have crafted a restriction on through service on large jets and simultaneously leave a loophole where through service

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[50] *See generally Continental Airlines, Inc. v. DOT*, 843 F.2d 1444, 1454 (D.C. Cir. 1988) ("[t]he range of aircraft with such small passenger capacity is limited and thus the exception will not undermine Love Field's status as a short – haul service airport."); 124 Cong. Rec. 30,670 (1978); H.R. Conf. Rep. No. 96-716 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78. *Kent decision* at Cross-Pet.App. 77 *et seq.*

[51] FW Pet.App. 146.

[52] FW Pet.App. 50.

could be easily accomplished by using a smaller plane for the first leg of a through flight to an interstate destination beyond the perimeter states?

The Fifth Circuit accepted DOT's strained reasoning under the *Chevron* doctrine,[53] disregarding the obvious conflict with the D.C. Circuit's interpretation of the Wright Amendment in *Continental*. Such an unwarranted reading cuts decisively against Congressional intent to keep Love Field short-haul, which was the foundation for the D.C. Circuit's affirmance of the DOT's 1985 interpretation.

To see the sophistry in DOT's interpretation, consider a passenger in New York City preparing to travel to Dallas Love Field under this "reinterpreted" Wright Amendment. That traveler will board a large jet in New York and travel on that aircraft over the long-haul segment to Houston, where he will then board a regional jet for the short-haul segment to Love Field. To say that traveler was not offered and sold through service to Love Field in violation of subsection (c)(2) is to behold "the tail wagging the dog."

If sufficient reason exists to have a federal law preventing through ticketing from Love Field, then the same statute should apply regardless of aircraft size. To conclude otherwise, one must willfully contort the statute's plain and intended meaning: the restrictions on through service must apply unless the *entire* journey is on aircraft operating under the commuter airlines exception. It should certainly apply here, where the long-haul segment is on a large aircraft and only the short-haul leg is on a

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[53] FW Pet.App. 50-51.

regional jet operating under the commuter airline exception. Despite the plain wording of the statute, DOT would require Congress to "gild the lily" by explicitly incorporating the through ticketing restriction in the commuter airlines exception.

The Shelby Amendment

The Wright Amendment – refined now by the Shelby Amendment – provides for flights beyond the seven-state perimeter *only* with aircraft that will seat fewer than 57 passengers. Flights transporting larger numbers of passengers (that would otherwise operate at DFW) are restricted to the perimeter states. Nothing in the words or history of the Wright Amendment or the Shelby Amendment suggests that Love Field was to be opened to *full-size* jet service to points beyond the perimeter. The commuter-airlines exception still reflects the basic rule of the Wright Amendment upheld by the D.C. Circuit: long-haul interstate flights are prohibited from Love Field to maintain Love Field as a short-haul facility.

The Shelby Amendment did not alter Love Field's basic character. That Appropriations Bill rider did just two things: (1) added three more states to the large jet perimeter and (2) authorized reconfigured jets with fewer than 57 seats under the commuter airline exception; the Shelby Amendment did not reverse Congress' intent to maintain Love field as a short-haul facility, and it certainly did not alter the through ticketing restrictions in subsection (c)(2).

While Congress may have intended, by passing the Shelby Amendment, some expanded service from Love Field, it permits that service only with smaller 56-

passenger jets, thereby imposing a practical limit to commuter service. With this restriction, any new long-haul service from Love Field will have inherent limitations: fewer passengers, fewer locations, less efficiency. Had Congress wanted to remove these impediments to long-haul service, the Shelby Amendment could easily have gone further in its modifications to the Wright Amendment and permitted service with planes of greater passenger capacity. But it did not.

An illustrative flight

To fulfill its apparent intention to administratively rewrite the Wright Amendment to encourage long-haul Love Field service, the DOT must rewrite the commuter-airlines exception by impermissibly adding words. A currently available travel scenario demonstrates the DOT's new language: A Continental Airlines passenger can now fly from Love Field to La Guardia with a brief touchdown in Houston to collect other passengers bound for New York on a large jet.[54] Only the intrastate segment from Love Field to Houston is flown by a 56-seat regional jet; Continental's passenger who boarded at Love Field has not flown to La Guardia or to "any point outside of Texas" on a small-capacity plane, thereby satisfying the commuter-airlines exception.

Rather than using the commuter airline exception, our Love Field passenger actually gets to La Guardia by *both* categories of aircraft – commuter aircraft to Houston and a full-size jet for the long-haul segment. Therefore, DOT's new interpretation permitting through service

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[54] *See* FW App.Pet. at 141-142, n.29.

requires rewriting subsection (a) to prohibit all interstate service at Love Field except for service provided "*in whole or in part* on aircraft with a passenger capacity of 56 passengers or less."

DOT's new interpretation of the commuter-airlines exception expands long-haul service from Love Field far beyond where the Shelby Amendment drew the boundaries. Permitting regional jets to funnel passengers to an intrastate hub where they can be collected for a full-sized aircraft to complete long-haul, through service defeats the inherent limitations Congress imposed.

Through service from Love Field to La Guardia is prohibited *regardless* of whether the segment from Houston to La Guardia is fed by a single large aircraft from Love Field or a regional jet. The commuter-airline exception is not involved when the second segment of the Love Field – La Guardia service picks up in Houston: subsection (a) of the Wright Amendment addresses flights between Love Field and points outside Texas only when the service is provided exclusively by commuter airlines. The flight from Houston to La Guardia is on a full-size aircraft, not a 56-passenger jet.

Subsection (c) certainly applies to full-size aircraft and to through service on one ticket, but allows interstate service only to one of the perimeter states; subsection (c) does not apply to lucrative through service from Love Field to major hub airports or international markets via Houston. In short, there is no provision in the Wright Amendment for opening through ticketing from Love Field "to the World" – regardless of the size of the planes used on the first leg of the flight.

In sum, the DOT and Fifth Circuit views of the through ticketing prohibition are aggressively illogical and profoundly at odds with Congress' intent. The D.C. Circuit's view is radically different from what appears to be DOT's current agenda and the unmerited deference by the Fifth Circuit. The D.C. Circuit's interpretation is the correct one: the Wright Amendment was passed to limit Love Field to short-haul air service. This Court should resolve the conflict between the two circuits by recognizing that the D. C. Circuit offers the well-reasoned view that is consistent with the intent of Congress.

The Airport's dilemma

The Fifth Circuit leaves the fate of DFW Airport to the tender mercies of DOT, deferring to the agency's "strain[ed]" interpretation of the Wright Amendment and its expertise on "aviation-related" issues, while ignoring the compelling logic of the D.C. Circuit's *Continental* decision.[55] To this Court of last resort, DFW Airport pleads that its fate not be shaped by the agency that:

- dismantled a 30-year-old agreement between Dallas and Fort Worth that was made, at the insistence of the federal government, in order to build and maintain a single regional airport for the Dallas/Fort Worth area;
- nullified the contracts that major air carriers voluntarily made with DFW Airport; and
- overturned the original purpose of the Wright Amendment by sanctioning long-haul air service at Love Field.

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[55] FW Pet.App. 51-52.

DFW Airport's future should be decided by rational, rather than by strained, interpretations of the Wright Amendment.

CONCLUSION

The lifeblood of DFW Airport is its stable of air carriers and the use agreements that comprehensively define the business relationship between the airport and those carriers. The mere reference in the exclusivity provision of the use agreement to the 1968 Bond Ordinance does not negate that privately ordered obligation. This Court should correct the Fifth Circuit's judgment to make that principle clear and consistent with *Wolens*.

Moreover, if linchpin terms of airport use agreements are preempted by the Airline Deregulation Act on the pretext that they constitute local government regulation of "rates, routes and services" by requiring carriers serving a metropolitan area to use the contracting airport's facilities exclusively, then the future operations of major airports in this country will be disrupted.

This Court should also correct the Fifth Circuit's unmerited deference to DOT's *sub rosa* rewrite of the Wright Amendment despite the clear conflict between that rewrite and the D.C. Circuit's prior interpretation of the same provisions. With DOT's unreasonable and unreasoned interpretation, every passenger leaving Love Field "for the World" is one less passenger leaving DFW Airport – the regional airport mandated by the federal government whose agency's decisions now undermine it.

Respectfully submitted,

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APPENDIX

DALLAS/FORT WORTH INTERNATIONAL AIRPORT RESTATED USE AGREEMENT

OCTOBER 1995

THIS RESTATED USE AGREEMENT, made effective as of the 5th day of October, 1995, by and between the Dallas-Fort Worth International Airport Board, (hereinafter called the "Board"), being the duly and lawfully constituted and operating Board of Directors of the Dallas-Fort Worth International Airport (hereinafter called the "Airport"), belonging jointly to the Cities of Dallas and Fort Worth, Texas (hereinafter called "Cities"), and having an office at 3200 East Airfield Drive Dallas-Fort Worth Airport, Texas 75261, and Continental Airlines (hereinafter called "Airline"), a corporation of the State of Delaware, having its principal office at 2929 Allen Pkwy., Suite 1401; Houston, Texas 77019.

WITNESSETH:

WHEREAS, the Use Agreement dated January 1, 1974, has since been amended by an Initial Amendment, a Second Amendment, and a Third Amendment without having ever been restated to incorporate the Use Agreement, as amended, into a single document; and

WHEREAS, the parties desire to restate the Use Agreement, as amended, without hereby making further substantive changes thereto;

NOW THEREFORE, the parties hereto, in consideration of the mutual promises herein contained, do hereby execute, adopt and agree to the following Restatement of the Use Agreement, as amended:

ARTICLE I

DEFINITIONS, CONSTRUCTION

SECTION 1.1 DEFINITIONS.

In and throughout this agreement, the following words shall have the following meanings, respectively, to-wit:

(a) "AIRCRAFT OPERATOR" means (i) a person owning one or more aircraft which are not leased or chartered to any other person for operation, and (ii) a person to whom one or more aircraft are leased or chartered for operation – whether the aircraft so owned, leased or chartered are military or non-military or used for private business, pleasure or governmental business, or for carrier or non-carrier operations, or for scheduled or non-scheduled operations or otherwise. Such phrase shall not mean the pilot of an aircraft unless he is also the owner or lessee thereof or a person to whom it is chartered.

(a-1) "AIRCRAFT PARKING RAMP AREAS" means those areas (as shown on Exhibit D and labelled area "V") between (and not including) the Terminal Structures and the Aircraft Circulating Areas, and which are used for loading and unloading passengers, property and mail to and from aircraft, providing aircraft with fueling and

lubricants, performing ramp service operations, inspection, maintenance of aircraft as setforth [sic] in the rules and regulations of the Board and the parking of mobile equipment used in connection therewith.

(b) "AIRPORT" means the Dallas/Fort Worth International Airport situated in the counties of Dallas and Tarrant in the State of Texas, the boundaries of which, including the initial structures, facilities and improvements, are shown on Exhibit E, attached hereto and made a part hereof.

(c) "AIRPORT SERVICES" means the general administration and operation of the Airport by the Board, including, but not limited to the following functions by the Board at the airport, to-wit: Airport police, crash, rescue and fire protection, and traffic control; the acquisition of land beyond the initial boundaries of the Airport for use as a part of the Airport; clearing, grading and draining, the costs of which are not charged or chargeable in specific terms to users under other agreements; industrial wastes, roadway systems, perimeter fencing and utilities systems; the furnishings of communications systems, facilities and tunnels; landscaping; the construction equipment and maintenance of facilities on non-revenue producing land and the maintenance of such land itself, facilities and areas or subdivisions of the Airport necessary in the operation and maintenance thereof, including the Board's administration, maintenance, police, crash, rescue, fire and operations space and facilities.

(d) "AIRPORT SERVICES COMPONENT" means those costs and expenses as determined in accordance with Schedule A attached hereto and made a part hereof.

(e) "AIRPORT SERVICES COSTS" means and shall include the total of (i) the costs, expenses and liabilities of the Board in providing Airport Services, including the Board's operations and maintenance costs and liabilities, however arising, properly charged or chargeable on an accrual basis of accounting to Airport Services; plus (ii) 1.25 times the debt service requirements on any Bonds of the Airport (other than Special Facility Bonds) allocable or chargeable to Airport Services, which allocation or charge shall be in the proportion that the Contract Costs for the construction or development of Airport Services bears to the Contract Costs for the construction or development of those portions of the Airport which are not financed with private capital or Special Facility Bonds; and plus (iii) all other costs, expenses, or liabilities of the Board, however arising (except debt service on Bonds allocable or chargeable to Airport Services and except Professional Fees other than as provided in Section 5.4 hereof), not specifically charged or chargeable in specific terms to the users under other agreements relating to the use of the Airport or any part thereof or of its lands. It is expressly provided that the cost of the premiums of insurance required or permitted to be carried under Section 8.1(b) hereof shall be included in Airport Services Costs.

(f) "AIRTRANS SYSTEM" means the automated transit system being constructed and installed by the Board and shall include vehicles, trucks and other facilities and equipment providing a means of transporting persons, baggage, mail, materials, supplies and trash, to, from and between certain facilities and structures within the Passenger Enplaning and Deplaning complex.

(g) "ANCILLARY NET REVENUES" means that amount, either positive or negative, derived by subtracting Gross Revenues of the Board (except overdue payments collected pursuant to Section 13.2(b)(iii) hereof), other than Landing Fees, from Gross Expenses of the Board less Landing Fee Elements. As used herein, the phrase "Gross Expenses of the Board less Landing Fee Elements" means the total of (i) operations and maintenance costs of the Airport except those employed directly in the determination of Landing Fees and indirectly in the Airport Services Component allocated to Landing Fees hereunder; (ii) debt service requirement on all outstanding Bonds at 1.25 to 1.0 coverage except those dollar amounts of debt service employed directly in the determination of Landing fees and indirectly in the Airport Services Component allocated to Landing Fees hereunder; and (iii) all other obligations of the Board required to be paid from revenues of the Airport except the dollar amount of such obligations included in the Airport Services Component employed in the determination of Landing Fees hereunder.

(h) "BASE PERIOD" means the period from the Starting Date through the next succeeding 30th day of September, which is the closing day of the Fiscal year.

(i) "CAPITAL IMPROVEMENT FUND" means a certain fund established by the Cities pursuant to Section 7.4 of the 1968 Concurrent Bond Ordinance.

(j) "CERTIFICATED AIR CARRIER" means a person who conducts Certificated Air Carrier Services. Certificated Air Carrier Services means aircraft operations of

the following types when operating on a regular and continuing basis, to-wit:

(i) interstate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Civil Aeronautics Board of the United States of America or any successor agency thereto;

(ii) services conducted by foreign air carriers according to published flight schedules holding permits or similar evidences of authority issued by the civil Aeronautics Board or any successor agency thereto or by any other agency or department of the United States of America; and

(iii) intrastate services conducted by commercial air carriers according to published flight schedules and holding certificates of public convenience and necessity or similar evidences of authority issued by the Texas Aeronautics Commission of the State of Texas or by any successor agency.

It is provided, however, that this term shall not include services provided by commercial "air taxi" operators meeting the requirements for exemption provided from time to time by any rules and regulations of the Civil Aeronautics Board, by the Texas Aeronautics Commission or by any other agency of the United States of America or the State of Texas having jurisdiction to provide such exemptions.

(k) "CONCESSIONAIRE" means a person having a lease, permit, contract or other fee arrangement with the Board entitling him to carry on a business at the Airport,

other than the business of transportation by aircraft, or to furnish materials to or to perform services for other persons at the Airport, other than transportation by aircraft at the Airport.

(l) "CONTRACT COSTS" means and shall include the Board's cost for the acquisition of land as provided in section 1.1(c) hereof, for labor and payments to contractors, suppliers and materialmen in connection with preparing, constructing and otherwise acquiring, replacing, extending and improving the Airport, and the costs, not covered by insurance, of restoring property damaged or destroyed in connection with construction.

(m) "CONSTRUCTION APPLICATION" means the Board's construction request form, a facsimile of such form being shown as Exhibit G, attached hereto and made a part hereof.

(n) "ENPLANED PASSENGERS" means all originating and on-line and off-line transfer passengers boarded at the Airport on Signatory Airlines' aircraft during the latest twelve (12) consecutive months for which such data are available.

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ARTICLE III

DURATION; CERTIFICATED AIR CARRIER SERVICES

SECTION 3.1 DURATION; SUSPENSION.

(a) This Agreement shall become effective upon execution and delivery hereof by the Board and by Airline, and the rights of use and occupancy granted herein shall commence on the Starting Date and subject to the other provisions hereof, this Agreement shall expire at midnight on December 31, 2009. Coincident with the effective date of this Agreement, the Letter agreement between the Board and Airline shall be suspended, except as recited in Section 3.1(b) hereof. Such suspension shall continue until the execution and delivery of agreement substantially similar to this Agreement between the Board and Air Canada, American Airlines, Inc., Braniff Airways, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Mexicana de Aviacion, Ozark Air Lines, Inc., Piedmont Aviation, Inc., and Texas International Airlines, Inc., individually, at which time the Letter Agreement between the board and Airline shall be cancelled in its entirety.

(b) During such period of suspension:

(i) The Letter Agreement between the Board and Airline shall be superseded by this Agreement in every respect, except that Paragraph C of the said Letter Agreement shall remain in effect until the said Letter Agreement has been cancelled pursuant to Section 3.1(a) hereof:

(ii) Section 5.1(a) and 5.9 hereof shall not be effective; and

(iii) Signatories to the Letter Agreement shall be considered Signatory Airlines under this Agreement for all purposes.

SECTION 3.2 CERTIFICATED AIR CARRIER SERVICES.

Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from, and at the airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance.

Order 85-12-81

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

[SERVED DEC 31 1985]

Issued by the Department of Transportation
on the 31st day of December, 1985

LOVE FIELD AMENDMENT PROCEEDING	:	Docket 43307

ORDER

By Order 85-7-65 (July 26, 1985), the Department requested comments on the interpretation of the Love Field Amendment (Amendment) (Sec. 29, International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35 (1980)), which restricts service by air carriers at Love Field, Texas.[1] Our request for comments followed announcement by Continental Airlines of its intention to commence service at Love Field and opposition of various persons to this service. On July 10, 1985,

[1] The question of proper interpretation of the Love Field Amendment was previously raised in the *Southwest Airlines – Muse Air Acquisition Proceeding*, where the Department found it unnecessary to reach the issue in its decision. Order 85-6-79 (June 24, 1985). We did, however, suggest that the issue should be resolved in another context. *Id.*

the Dallas/Fort Worth (DFW) Parties[2] submitted a letter to the Department's Office of Aviation Enforcement and Proceedings seeking an informal enforcement investigation and order prohibiting Continental's proposed service.

* * *

to bar air carriers who interline elsewhere on their systems from serving Love Field.

The legislative history supports our view that Congress intended to make Love Field a short-haul airport limited to turnaround intrastate and interstate service in five states. As a result, subclauses (1) and (2) are not properly read as class and operational restrictions, respectively. Rather, these subclauses simply specify interline and online restrictions applicable to service at Love Field.

Moreover, statements of Congressman Anderson of California and Senator Cannon of Nevada also support this interpretation of the Amendment. Each was a member of the Conference Committee, and each was the floor manager of the bill reported out of the Conference Committee. The views of Conference Committee members and floor managers are entitled to greater weight than that usually afforded the views of individual legislators, especially where such expressed views are consistent with other elements of the legislative history. *Train v. Colorado Public Interest Group*, 426 U.S. 1, 14 (1976). The DFW

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[2] The DFW Parties are the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth International Airport Board.

Parties and Southwest rely on the statements of Congressman Wright in support of the House version of the bill, rather than those of Congressman Anderson and Senator Cannon in support of the Committee version; however, Congressman Wright was not a member of the Conference Committee, the bill reported by that Committee was not the House version he had sponsored, and both the House and Senate accepted the compromise provision reported out by the Conference Committee.

On the floor of the House, Congressman Anderson, explaining the Amendment, said: "The prohibition in section 29(c)(1), against an air carrier providing through service or ticketing with another air carrier . . . only applies with respect to a carrier's Love Field service. . . ." 126 Cong. Rec. H. 520 (February 4, 1980). In a colloquy on the Senate floor, Senator Cannon expressed the same understanding. 126 Cong. Rec. S. 952 (February 5, 1980). The legislative history, taken as a whole, supports our view that the intent of Congress in the Love Field Amendment was to limit interstate service at that airport to short-haul, turnaround flights, not to prohibit carriers offering interline services elsewhere from serving Love Field. The floor debates likewise indicate that operations not touching Love Field were not to be included within the prohibitions of the Amendment.

In sum, the Department believes that the plain wording of the Amendment and the legislative history, including the Conference Report and relevant statements by the Amendment's floor managers, show that our less restrictive interpretation of the Amendment is correct. Thus, we find that Continental may serve Houston from Love Field, although the carrier provides interline services

elsewhere on its system. This conclusion is supported by the comments of various parties, including the Justice Department, American West, and Air Midwest. The arguments of the DFW parties and Southwest to the contrary are not persuasive. Further, since we find that Continental may serve Love Field consistent with restrictions of the Amendment, we have determined that it is not necessary to address Continental's additional argument that the amendment may violate the equal protection clause.

Finally, Republic argues that permitting Continental to serve Love Field is unfair in a competitive sense, since our interpretation of the Amendment benefits those carriers who maintain hubs in Texas and the four contiguous states to the exclusion of those who do not. Republic's argument is not convincing. Republic is free to establish its hubs wherever it chooses. There is nothing competitively unfair to Republic in our interpretation of the Love Field Amendment as drafted and intended by Congress.

MARKETING RESTRICTIONS

Continental raised four questions in its comments regarding marketing problems faced by carriers serving Love Field. The statements attached to its comments are a vivid demonstration of the confusion present today in Love Field service. Continental first asks: 1) whether a passenger may buy two tickets (so-called "double ticketing") at Love Field, one for service from Love Field to a point within Texas or the four adjacent states, and a separate, second ticket for service from that destination to a beyond point; and 2) whether the second ticket may be for the carrier's most efficient connecting flight. The

answer to both questions is yes. To hold otherwise would be unreasonable and beyond that needed to effectuate the Amendment's restrictions. *See*, CAB Order 80-12-102 (December 18, 1980).

The language of the Amendment and its legislative history indicate that Congress had two concerns in restricting service to Love Field. First, Congress intended to prohibit carriers from providing through service and ticketing beyond the authorized Love Field service area. Conference Report at 25. However, Congress did not intend to preclude a carrier from operating flights from a destination point served from Love Field to a point outside the Love Field service area. *Id.* at 26. Second, Congress intended to prohibit carriers from promoting, offering, or holding out service from Love Field to a point beyond the service area. Subsection (c). Conference Report at 25. Congress used the word "offer" in the Amendment itself; although the legislative history refers to "holding out." In some contexts, the terms "offer" and "hold out" can be used interchangeably. *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956); *Cf. Grsjewski v. Commissioner*, 723 F2d 1062, (2d Cir. 1983).

"Through service" and ticketing specifically refer to the provision of transportation between an ultimate origin and destination on a single ticket for a single sum fare. *Cf. Tariff Flexibility Rulemaking* ER-1246, Order 81-81-58 (November 10, 1981). *See also, Visit USA/Export/Inland Contract Rate Investigation (VUSA Investigation)*, Order 84-B-55 at 26 (August 10, 1984). The service may be offered on a single flight with one or more stops, or it may be offered on connections between two flights. The key concept is that it is sold by the carrier, and perceived by the

passenger, as a single trip on a single ticket for a single sum fare, thus constituting a single contract.[8] Through service provides certain conveniences for the passengers. For example, the passenger need not reclaim checked baggage upon arrival at the connecting point and recheck it on the next flight on his or her itinerary.

In contrast, double ticketing involves the use of two tickets (hence, two contracts of carriage), the payment of two separate fares, and requires the passenger to forego the service convenience associated with through ticketing. Although Congress prohibited through service and fares at Love Field, it intended that a carrier's "usual ticketing, scheduling and ratemaking practices would not be otherwise affected." Conference Report at 26. Such "other" practices may include double ticketing. *Cf. Interstate and Intrastate Fares in California Markets*, 71 CAB 23 (1976).

The language of the Amendment makes clear that a carrier cannot advertise, promote, or otherwise affirmatively solicit double-ticketing passengers. The question, then, is whether the sale of double-ticketed service at the unsolicited request of a customer amounts to an offer or holding out. Such a sale is not necessarily an offer. An offer is a proposal to sell a ticket or provide transportation. *Frissell v. Nichols*, 94 Fla. 403, 114 So. 431, 433 (1927);

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[8] In the case of connecting flight service, the amount of the fare may be calculated by simply adding the local fares on individual flight segments, or it may be a different, usually lower, fare reflecting costs or competitive considerations. The key concept, again, is that the fare is stated as a single amount. *Cf. VUSA Investigation*, Order 84-8-55 at 27.

Cf. Daitom, Inc. v. Pennwalt Corporation, 741 F2d 1569 (10th Cir. 1984). If a carrier simply responds to a customer's unsolicited request, it has not proposed to sell air transportation, but, rather, has accepted a proposal to buy such transportation from the customer, although the carrier's acceptance results in a contract. Congress prohibited carriers from "offering for sale . . . transportation to or from . . . any, point which is outside [the Love Field Service area]"; but neither the wording nor the legislative history prohibits carriers from selling, or passengers from purchasing, transportation to points outside the Love Field service area. While the Amendment prohibits single-plane flights, interline service, through service and ticketing, and advertising and promotion of service outside the Love Field service area, it does not appear that Congress intended to preclude entirely the use of Love Field by passengers who take the effort to find out that double-ticketed service is available, who demand such tickets, and who accept the inconvenience of that service. Thus, to prohibit double ticketing or the sale of a carrier's most convenient flight from a destination in the Love Field authorized service area to a beyond point exceeds what is necessary to prohibit through service and ticketing from Love Field.

Continental's second question, also asked by Delta, is whether a carrier may display in a computer reservations system under "connections" service from Love Field to a point beyond the restricted service area. The answer is no. The Conference Report is clear on this question. It says that "carriers may not hold out, offer or advertise Love Field service to or from points beyond the four

contiguous states in any respect, including the publication of connecting flight schedules in airline guides, flight schedules, or similar media." Conference Report at 25. The ban on advertising of service from Love Field beyond Texas and the four contiguous states is clearly envisioned by the Amendment. The phrase "airline guides, flight schedules, or similar media" includes computer reservations systems. These systems were used at the time of the Amendment's passage and not specifically excluded.

Continental's third, related marketing question is whether a carrier may advertise connecting service and display connecting service, as such, in its flight schedules. Again, the answer is no. Unsolicited information furnished to the public in any form is a means of offering or holding out, which is prohibited. *See, e.g., Red Ball Transit Co. v. Marshall* 8 F.2d 321,323 (S.D. Ohio 1925). Moreover, as discussed above, Congress clearly contemplated prohibiting publication of such flights in individual carrier schedules, as well as industry information media.

Continental's fourth question concerns the marketing of fares and their construction. Continental asks whether a fare could be sold and constructed for service from Love Field to a point outside the restricted service area that is different from the sum of the local fares (Love Field to a point in the authorized area, plus that point to a point outside the service fare.) This practice would clearly involve the offer of a through fare, since it could not be considered an anything but a single sum fare. Moreover, it could not be offered as anything but a single contract of carriage, *i.e.*, a single through ticket. This is different from the double-ticketing situation, discussed above, which

involves two separate contracts of carriage. The Conference Committee Report states that " . . . a carrier could not . . . offer through fares between Love Field and points beyond the contiguous States . . . " Conference Report at 26. Therefore, a carrier cannot offer a constructed fare for double-ticketed service originating or terminating at Love Field.

Throughout this discussion on marketing, we have used the term "carrier" to include travel agents or other persons or methods used by the carrier to sell its tickets and services. Whenever an agent is acting for its principal, the same restrictions applied to the principal apply to the agent.

SMALL AIRCRAFT OPERATIONS

In connection with its computer reservations system, Delta asks whether a certificated carrier using small aircraft should be treated the same as a commuter carrier serving Love Field. The Amendment specifically authorizes interstate air transportation at Love by commuter airlines using aircraft of 56 seats or less. The term "commuter airline" is not defined elsewhere in the Amendment. The Amendment's language must, therefore, stand on its own. Since Congress specified the size of the commuter aircraft, and since such aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative.[9]

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[9] The Department has taken this approach to all aspects of economic regulation of commuter air carriers. 14 C.F.R. 298.90.

Thus, we find that operations by either a certificated or non-certificated carrier using small aircraft are exempt from the Amendment with respect to Love Field operations.

INTRASTATE OPERATIONS

We also asked for comments on whether the Amendment applies to intrastate service within Texas. The Amendment is somewhat ambiguous on this question. Subsections (a) and (b), by their terms, apply only to flights from Love Field to "points outside the State of Texas." Subsection (c), however, states that subsections (a) and (b) do not apply to, and under certain conditions carriers may provide, flights between Love Field and "points within the State(s) of . . . Texas." The Conference Report states that the "provisions do not affect . . . intrastate service in Texas." Conference Report at 25. Thus, we conclude that the Amendment does not apply to service by an intrastate carrier or to service carrying only intrastate passengers by an air carrier.

The more difficult issue, however, is the application of the Amendment to air carriers providing both intrastate and interstate service on the same flight. The CAB faced this question in Order 80-8-181. It decided that carriers could not evade the Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area. The Department believes the CAB was substantially correct. In our view, an air carrier providing interstate service within the authorized four-state service area may provide intrastate

service from Love Field on the same flight without violating the Amendment's restrictions. However, the carrier cannot offer, promote, or sell through service and fares or tickets between Love Field and points outside the authorized service area using another Texas city as the connecting point.

ACCORDINGLY,

1. Continental or its agents may provide service from Love Field, Dallas, Texas, to Houston, Texas;

2. Continental or its agents may sell a ticket from an authorized destination of a flight from Love Field to a point beyond that destination, if demanded by a passenger, separately from the ticket for the Love Field flight, provided the amount of the tickets equals the sum of local fares;

3. Continental or its agents may not by any means whatsoever list or advertise "connecting" flights for an authorized Love Field flight to a point beyond the Love Field service area, including listings in a computer reservation system;

4. Delta may list in its computer reservation system service by certificated air carriers that use aircraft of 56 seats or less serving Love Field in a manner similar to listings for commuter air carriers; and

5. The Amendment does not apply to service by intrastate carriers or intrastate service by an air carrier certificated under the Act.

By:

Matthew V. Scocozza
Assistant Secretary for Policy
and International Affairs

(SEAL)

CIVIL AERONAUTICS BOARD (C.A.B.)

DALLAS/FORT WORTH-FLORIDA
SERVICE INVESTIGATION
Docket 32711
(79-5-231)

Adopted May 31, 1979

May 31, 1979
OPINION AND ORDER

This proceeding involves various applications of 13 air carriers[1] for amendment of their certificates to authorize interstate air transportation between Dallas/Fort Worth and several points in Florida.

After hearing, Administrative Law Judge Katherine A. Kent issued part I of her initial decision; on April 19, 1979, disposing of all but one of the issues in this proceeding. The sole unresolved issue, whether Love Field should be designated as an airport for interstate service at Dallas/Fort Worth, will be the subject of part II of Judge Kent's decision infra.[2]

In part I of her initial decision, Judge Kent awarded to all applicants the authority which they had severally requested, but only for those particular markets for which illustrative schedules had been presented to the

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[1] Air Florida. American, Braniff, Continental, Delta, Eastern, National, North Central, Northwest, Ozark, Southern, Texas International, and Western.

[2] As for Judge Kent's present assertion (initial decision, part 1, p. 805 infra) that the Love Field issue has through 'apparent forgetfulness' been placed in issue in another proceeding, Southwest Airlines, Love Field Interstate Service, 80 C.A.B. 647, 650, n. 8 (1979), shows that she is mistaken.

respective applicants. Consequently, Part I of Judge Kent's initial decision granted in full the applications of Continental, Eastern, National, North Central, Northwest, Ozark, Southern, Texas International, and Western. However, Air Florida, American, Braniff, and Delta had failed to provide illustrative schedules for all markets covered by their applications,[3] and the judge accordingly granted their applications only in part, i.e., for those markets covered by illustrative schedules.

No petitions for review of the authority granted by part I of the initial decision have been received, but American and Braniff have petitioned for review of said decision insofar as it failed to grant their requested authority for markets not covered by illustrative schedules. Our Bureau supports the petitions.

In the absence of any requests for review, we have decided to affirm so much of part I of the initial decision as granted the applications of all 13 air carriers in this proceeding, and all authority so granted may become effective immediately.[4]

However, upon review of so much of part I of the initial decision as denied requests for authority in markets not covered by illustrative schedules, we have decided, for the reasons set forth below, to reverse and reopen the record for consideration of those markets.

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[3] Initial decision, part 1, p. 808 infra.

[4] The initial decision is included herein.

ILLUSTRATIVE SCHEDULES

Judge Kent correctly noted that it has been, and continues to be, the Board's general policy to award authority only in markets for which an applicant has presented illustrative proposals[5] and that all applicants in this proceeding should have complied with this requirement. Nonetheless, as we recently explained in California-Nevada Low-Fare Route Proceeding, 81 C.A.B. 135, 141 (1979), but one day before Judge Kent issued the subject decision, we recognize that there has been a 'lack of clarity with respect to this requirement during the past evolutionary period * * * .' We have therefore decided to accord the instant defective applications the same treatment we gave to those in that case (*ibid.*):

> [Rather than deny the applications as the judge did, to the possible detriment of the applicants and the public, we shall defer them for the present. We shall reopen the record to allow named carriers to submit illustrative proposals for named markets and allow the parties to respond to that newly submitted evidence.

All four carriers whose applications were denied in part by Judge Kent – not only those two who filed petitions for review – will have an opportunity to cure their defective applications by submitting illustrative schedules.[6]

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[5] Initial decision, part I. p. 808 infra, n. 7, citing Northeast Points-Puerto Rico/Virgin Is, Service, 79 C.A.B. 312, 316-317 (1978).

[6] In light of our multiple certificate awards, we are dismissing the application of American and Delta for exemption authority in some of the markets involved in this proceeding.

ACCORDINGLY –

1. We amend the certificates of Air Florida, American, Braniff, Continental, Delta, Eastern, National. North Central, Northwest, Ozark, Southern, Texas International, and Western as shown included herein appendix A;

2. The amended certificates shall be signed on behalf of the Board by the Secretary, shall have affixed the seal of the Board, and shall be effective on the date of this order: Provided, however, That the continuing effectiveness of the authority granted here shall be conditioned upon the timely payment of such license fees as may be prescribed by the Board;

3. The authority granted to North Central, Ozark, Southern, and Texas International shall be classified as subsidy ineligible, category II;

4. We defer the requests for authority indicated in appendix B;

5. We reopen the record to receive service proposals containing the information set forth in appendix C for those carriers in those markets set forth in appendix B. Such proposals shall be filed within 15 days after service of this order[7] and responsive pleadings may be filed within 10 days thereafter;

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[7] We accept the service proposals submitted subsequent to the initial decision by American and Braniff; answers to these proposals will be filed within 10 days of the service date of the order. The Tampa Bay Area Parties' answer supporting American's petition is deemed to be filed as an answer supporting American's service proposal.

6. We dismiss the applications for exemption authority in dockets 33234 and 33358.

All Members concurred.

Civil Aeronautics Board (C.A.B.)

APPENDIX A

Amendments to certificate of Air Florida, Inc.

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Tampa/St. Petersburg/Clearwater and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
American Airlines, Inc., for route 4

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be several through DFW Regional Airport), the intermediate points Orlando and West Palm Beach, and the terminal point Fort Lauderdale.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Braniff Airways, Inc., for route 9

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Orlando and West Palm Beach, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Continental Air Lines, Inc., for route 29

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Jacksonville, Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth. Amend the condition which currently reads: 'Flights serving Tampa-St. Petersburg-Clearwater and Orlando, Fla., shall also serve Houston' to make it applicable only to flights on the segment which reads 'Between the terminal point Houston, Tex., and the coterminal points Tampa-St. Petersburg-Clearwater and Orlando, Fla.'

Amendments to certificate of
Delta Air Lines, Inc., for route 24

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Eastern Air Lines, Inc., for route 5

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Orlando and Jacksonville, and the terminal point West Palm Beach.

Amendments to certificate of
National Airlines, Inc., for route 39

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Jacksonville, Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth. Amend condition 3 by adding:

Provided that this condition shall not apply to flights on segment . . .

Amendments to certificate of
North Central Airlines, Inc., for route 86

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Jacksonville, Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Northwest Airlines, Inc., for route 2

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Tampa/St. Petersburg/Clearwater, Orlando, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Ozark Air Lines, Inc., for route 107

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate

points Orlando, and Jacksonville, and the terminal point West Palm Beach.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Southern Airways, Inc., for route 98

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Jacksonville, Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Texas International Airlines, Inc., for route 82

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Tampa/St. Petersburg/Clearwater, Jacksonville, Orlando, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth.

Amendments to certificate of
Western Air Lines, Inc., for route 19

Add a new segment:

Between the terminal point Dallas/Fort Worth (to be served through DFW Regional Airport), the intermediate points Orlando, Tampa/St. Petersburg/Clearwater, West Palm Beach, and Fort Lauderdale, and the terminal point Miami.

Add a condition: All flights on segment . . . shall serve Dallas/Fort Worth. The effective date of this authority is June 4, 1979.

APPENDIX B

Additional Florida points for which certificated authority is requested: Air Florida – West Palm Beach, Orlando, and Jacksonville; American – Tampa and Miami; Braniff – Tampa, Jacksonville, and Fort Lauderdale; Delta – Jacksonville and Orlando.

APPENDIX C

Service proposals covering points set forth in appendix B are to disclose (1) type and capacity of equipment likely to be used; (2) elapsed trip time of flights in block-hours over the segment(s); (3) environmental evaluation, as required by 14 CFR part 312; (4) estimate of gallons of fuel to be consumed in the first year of operations; (5) statement as to availability of required fuel.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE KATHERINE A. KENT

- PART I

Certificates of Air Florida, American, Braniff, Continental, Delta, Eastern, National, North Central, Northwest, Ozark. Southern, Texas International and Western amended to authorize permissive, subsidy-ineligible air transportation between Dallas/Fort Worth and various points in Florida, provided that all flights must serve Dallas/Fort Worth and provided further that Dallas/Fort Worth shall be served through the Dallas/Fort Worth Regional Airport until the Board determines whether Love Field should be designated as an airport for interstate service at Dallas/Fort Worth. The Love Field issue will be decided by part II, infra, of this initial decision after the filing of briefs by the parties. This decision does not constitute a major Federal action significantly affecting the quality of the human environment.

APPEARANCES:

Robert P. Silverberg and Benjamin P. Lamberton for Air Florida, Inc.
Carl B. Nelson, Jr. for American Airlines, Inc.
Carol A. Cichowski for Braniff Airways, Inc.
Beth Troiano for Continental Air Lines, Inc.
Douglas L. Abramson for Delta Air Lines, Inc.
Naomi Licker for Eastern Air Lines, Inc.
Edwin O. Bailey for National Airlines, Inc.
Ronald D. Eastman and Stephen C. Trow for Northwest Airlines, Inc.
Thom G. Field for Ozark Air Lines, Inc.
William A. Nelson for Southern Airways, Inc.
Paul Y. Seligson for Southwest Airlines Co.

Harold J. Pareti for Texas International Airlines, Inc.
Robert Bauer for Western Air Lines, Inc.
Arthur Petersen, Charles C. Wells, and C. Merrill Bierfield for the Dallas/Fort Worth Parties.
Robert M. Beckman and Angela C. Beckman for the Tampa Bay Area Parties.
Robert G. Cross for the Texas Aeronautics Commission (rule 14 participant).
Joseph Bolognesi and Thomas G. Chew for the Bureau of Pricing and Domestic Aviation.

CHRONOLOGY

March 21, 1978. – American Airlines filed an application and motion for hearing requesting nonstop authority between Dallas/Fort Worth and Miami/Fort Lauderdale.

June 12, 1978. – The Board served order 78-5-129, instituting the Dallas/Fort Worth-New Orleans-Florida Service Investigation, an investigation of the need for nonstop authority in nine markets – Dallas/Fort Worth-Tampa, Dallas/Fort Worth-Miami, Dallas/Fort Worth-Fort Lauderdale, New Orleans-Tampa, New Orleans-Miami, New Orleans-Fort Lauderdale, Tampa-Miami, Tampa-Fort Lauderdale, and Miami-Fort Lauderdale – and consolidating applications of American and Texas International Airlines. The order included the boilerplate language current at that time instructing the judge to take low-fare offers into consideration in deciding the issue of public convenience and necessity and noted in a footnote that the Board was contemplating a change in its directions to judges in this matter and would issue a subsequent order. Various carrier and civic interests were made party to the investigation including the Dallas/Fort Worth Parties.

June 13, 1978. – The judge issued a notice of prehearing conference to be held on July 25, 1978.

June 28-July 3, 1978. – Applications and motions to consolidate were filed by 12 carriers. Petitions for reconsideration were filed by four carriers, as well as one petition for clarification.

July 19, 1978. – The judge issued order 78-7-68, granting the motions of 12 carriers to consolidate: Air Florida, American, Braniff, Continental, Delta, National, North Central, Northwest, Piedmont,[1] Southern, Texas International, and Western.[2]

July 25, 1978. – Prehearing conference was held, at which November 29, 1978, was set as the date for hearing.

July 27, 1978. – The judge's report of prehearing conference was issued. It was served on August 4, 1978.

August 2, 1978. – The Board served order 78-7-128 (Florida Service Case Evidence, 77 C.A.B. 880 (1978)) in the Florida Service Case, docket 33091, which affected this proceeding in two respects and resulted in postponement of the hearing from November 29, 1978, to March 20, 1979: (1) August 2-11, 1978 – Florida Service Case, Evidence, supra, revised the boilerplate the Board had

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[1] On August 22, Piedmont withdrew its application, which was then dismissed by order 78-11-46 served Nov. 14, 1978.

[2] Ozark Air Lines filed a late application and motion to consolidate, which was dismissed by onder [sic] 78-7-151, served July 27, 1978. Ozark subsequently reapplied after the Board's order changing the scope of the investigation (78-11-15), and its application was consolidated (78-11-158).

used in previous orders instituting route proceedings (including this investigation), announcing that it was not interested in low-fare offers or price/quality options. Because of the imminence of a date upon which exhibits were to be filed (August 18), the judge issued an order on August 7, 1978, applying the Board's new philosophy and eliminating issues and evidence requests related to fare proposals in order to relieve the parties of the burden of compliance, even though Florida Service Case, Evidence, supra, did not apply to this case. On August 11, 1978, the Board served order 78-8-48, amending orders in nine cases, including this one, to include its new boilerplate language. (2) August 2-September 18, 1978 – order 78-7-128 (77 C.A.B. 880) also instituted the Florida Service Case, which included investigation of service in six of the nine markets already in issue in this case – New Orleans-Tampa, New Orleans-Miami, New Orleans-Fort Lauderdale, Tampa-Miami, Tampa-Fort Lauderdale, and Miami-Fort Lauderdale. On September 5, 1978, the judge submitted to the Board a certification requesting that the Board clarify whether it intended that service in these six markets be investigated in both cases or not and requesting that the Board respond promptly, since direct exhibits were to be filed by the parties to this case on September 22. The Board not having acted on this request nor on the petitions for reconsideration filed June 30-July 3, the judge on September 18, 1978, issued an order postponing procedural dates in this case in view of the uncertainty as to the scope of the investigation.

October 24, 1978. – The Airline Deregulation Act of 1978, amending the Federal Aviation Act of 1958, became law upon signing by President Carter.

November 9, 1978. – The Board served order 78-11-15, acting on the petitions for reconsideration in this case and the Florida Service Case and on the judge's September 5 certification to the Board. The order removed from this case the three New Orleans markets, added three new Florida points (Orlando, Jacksonville, and West Palm Beach), changed the focus of the investigation from nonstop service in the markets to service 'between and among' the seven remaining points (Dallas/Fort Worth, Tampa, Miami, Fort Lauderdale, Orlando, Jacksonville, and West Palm Beach) with the proviso 'that any authority awarded shall be subject to the condition that all flights must serve Dallas/Fort Worth,' renamed the case the Dallas/Fort Worth-Florida Service Investigation, and noted that the substantive provisions of the Airline Deregulation Act of 1978 would be applicable to the proceeding.

Order 78-11-15 also dealt with the petition for clarification filed by Air Florida on July 3. According to the Board's order, Air Florida requested that the Board 'not preclude service to Dallas/Fort Worth through Love Field instead of, or in addition to, DFW Regional Airport.' The Board responded as follows (emphasis added):

As to Air Florida's airport question, the instituting order did not designate the airport through which Dallas is to be served, and we have decided to leave the question open for now rather than to impose a pretrial restriction. The parties should address this issue in their exhibits and testimony, and the judge should deal with it in the initial decision.

November 14, 1978. – The judge issued a notice directing that a second prehearing conference would be held on December 19, 1978 (amended by notice to all parties dated November 22).

December 4, 1978. – Order 78-11-158 was served, granting motions to consolidate new applications filed in response to order 78-11-15 by 13 carriers, who are the final applicants in this case: Air Florida, American, Braniff, Continental, Delta, Eastern, National, North Central, Northwest, Ozark, Southern, Texas International, and Western. On the same day, Southwest Airlines Co. was granted permission to intervene (order 78-12-15).

December 19, 1978. – The second prehearing conference was held, at which revised issues and evidence requirements were adopted and new procedural dates were established, setting hearing for March 20, 1979. Specifically in issue was the following, in response to the Board's direction in order 78-11-15, as to which the parties were ordered to produce evidence: 'Should Love Field be designated as an airport for interstate service at Dallas/Fort Worth?'

December 28, 1978. – The judge's report of the second prehearing conference was issued, which was served on January 5, 1979.

January 10, 1979. – A supplemental report of the prehearing conference was served, deleting most of the evidence requirements imposed in the previous report in recognition of the Board's elimination of the necessity for evidence showing fitness, willingness, and ability by Chicago-Midway Expanded Service Investigation, 80 C.A.B. 479 (1979).

March 20-22, 1979. – Hearing was held. As a result of all the preceding events, the only controverted issue in the 3-day hearing was the Love Field issue, which was fully tried. While the hearing was in progress, the Board, in apparent forgetfulness, ordered the parties to try the same issue over again before another judge by order 79-3-150 dated March 22, 1979 (80 C.A.B. 647).

March 23, 1979. – The judge issued an order stating that no briefs would be necessary on the noncontroversial issues of route authority and that, in order that service not be delayed, she would issue this part I of the initial decision granting certificate authority to all 13 applicants in accordance with the illustrative schedules presented in evidence, limited to service at Dallas/Fort Worth Regional Airport.[3] Briefs with respect to the Love Field issue were ordered to be filed on April 19, 1979, after which part II of the initial decision would be issued dealing with that subject.

April 10, 1979. – Because major portions of the transcript received from the Acme Reporting Company were incomprehensible, the judge acquired the tapes on April 2 and went over the entire transcript, issuing eight orders extensively correcting the transcript between April 4 and April 9. Since the transcript of hearing on the Love Field issue is very important in this case (tr., pp. 556-557), and copies of the principal orders correcting it would not be served upon the parties until the week briefs were due, the judge postponed the brief date until May 8, 1979.

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[3] See n. 4, infra.

FINDINGS AND CONCLUSIONS

As indicated previously, this part I is limited o [sic] the uncontroverted issue of certificate authority for all 13 applicants in accordance with the illustrative schedules presented in their exhibits and is issued separately in order that new service may be inaugurated by those carriers who wish to do so without delay. The separate issue whether Love Field should be designated as an airport for interstate service, which, after all, is urged by only one of the 13 applicants (Air Florida), will be decided in part II of this initial decision after the parties file briefs on that subject. In the meantime, all the carriers may, commence service using Dallas/Fort Worth Regional Airport.[4]

Aside from the Love Field issue no exhibits were presented in opposition to any carrier's illustrative schedule, nor was there any cross-examination; and no party requested the filing of briefs. There is thus no reason to delay decision.

Section 401(d)(1) of the Act requires that the Board issue a certificate authorizing the whole or any part of the transportation covered by any application:

* * * if it finds that the applicant is fit, willing, and able to perform such transportation properly and to conform to

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[4] This is in conformity with the Board's action in Southwest Airlines, Love Field Interstate Service, 80 C.A.B. 647 (1979), wherein Southwest Airlines was authorized to serve Dallas-New Orleans through the Dallas Forth Worth Regional Airport pending final decision on the same issue in docket 34582.

the provisions of this Act and the rules, regulations, and requirements of the Board thereunder, and that such transportation – (A) in the case of interstate or overseas air transportation, is consistent with the public convenience and necessity * * * .

Section 401(d)(9)(A) of the Act provides that the applicant has the burden of showing that it is fit, willing, and able. The Board has stated that it views 'fitness, willingness, and ability essentially as a measure of a carrier's qualification to provide a broad category of service' and that 'once a carrier has shown that it is 'fit, willing, and able' to perform service of a certain basic scope and character, it need not present additional evidence of its ability to operate within the scope of service in other markets.'[5] All the applicants in this case other than Air Florida are carriers which have long been certificated to provide and have provided in other markets, scheduled air transportation of the scope and character they might provide in the markets in issue here. They are therefore qualified under the Board's criteria.

As to Air Florida, at the second prehearing conference (December 19, 1978), the judge ruled that, since that carrier's fitness was already at issue in a case then pending before another judge where the full panoply of fitness evidence had been presented, that judge's decision on the issue would be adopted here. On February 22, 1979, Judge William A. Kane, Jr., issued his recommended decision in the U.S.-Bahamas Service Investigation, docket 32294, which was served on March 8, 1979. Judge Kane

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[5] Chicago-Midway Expanded Service Investigation, *supra*.

examined extensive evidence on Air Florida's fitness and on its relationships under section 408 and 409 of the Act. Those portions of Judge Kane's decision and his findings and conclusions dealing with those issues are hereby incorporated herein.[6]

The 13 applicants herein are found to be citizens of the United States within the meaning of the Act and are fit, willing, and able properly to perform the air transportation authorized herein and to conform to the provisions of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and requirements of the Board thereunder.

Sections 401(d)(9)(B) and (C) provide that an opponent of an application has the burden of showing that the transportation applied for is not consistent with the public convenience and necessity and that such transportation shall 'be deemed to be consistent with the public convenience and necessity, unless the Board finds based upon a preponderance of the evidence that such transportation is not consistent with the public convenience and necessity.' Since no evidence has been presented in opposition to the applications, it is found that the transportation applied for is consistent with the public convenience and necessity.

In accordance with the Board's policy of granting all applications for which the applicants have submitted illustrative schedules, this decision will amend the certificates of all the applicants to authorize them to provide

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[6] Docket 32294, recommended decision served Mar. 8, 1972, pp. 49-50 and app. F.

service, on a subsidy-ineligible basis, between Dallas/Fort Worth Regional Airport and the points for which they have presented illustrative schedules in evidence. In conformity with the Board's order 78-11-15, such authority will be subject to the condition that all flights must serve Dallas/Fort Worth. Also in accordance with Board policy, authority is not awarded in markets for which no illustrative schedules were presented.[7]

Footnote 11 in order 78-11-15 stated that carriers could apply for, and the judge could award, authority 'as one segment, as six separate segments, or as any combination between the two.' Since this permission would result in 63 different possibilities of awards for each applicant,[8] the judge requested that each applicant make clear in its exhibits just what authority it was seeking. Except as noted in footnote 7 herein, the applicants have done so in their illustrative schedules, and the awards made herein are in conformity with those exhibits.

It must be recognized that some of the carriers granted certificate authority herein already have

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[7] As noted subsequently, only 4 of the 13 applicants (Air Florida. American, Braniff, and Delta) did not comply with the Board of policy of providing illustrative schedules for all authority requested. All parties had been on notice of such policy at least since Northeast Points-Puerto Rico Virjin [sic] Is. Service 79 C.A.B. 312 (1978), (mid-December of 1978), and direct exhibits were not filed in this case until Jan. 26, 1979. The other nine carriers complied.

[8] The attachment to app. B of report of second prehearing conference served Jan. 5, 1979, lists the 63 possible awards.

authority in some of the markets included in this investigation,[9] either under previously effective certificates, by grants under the unused-authority provisions of the Act, by action law,[10] or by other actions of the Board.[11]

Air Florida's illustrative schedules,[12] show round-trip service, Dallas/Fort Worth-Tampa-Miami and Dallas/Fort Worth-Miami-Fort Lauderdale, as well as one-way service Dallas/Fort Worth-Fort Lauderdale and Fort Lauderdale- Miami-Tampa/St. Petersburg/Clearwater[13]-Dallas/Fort Worth. Its proposed certificate[14] suggests a linear route description, which will be adopted (Dallas/Fort Worth-Fort Lauderdale-Miami-Tampa) with right to begin or terminate trips at points short of terminal points, subject to the Board's restriction that all flights must serve Dallas/Fort Worth. This description will permit Air Florida to perform the service described in its illustrative schedules, plus other combinations of service

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[9] For example, the 'Official Airline Guide' for Apr. 1, 1979, shows the following carriers offering service in the Dallas/Fort Worth-Florida markets; DFW-FLL – Braniff, Eastern; DFW-JAX – Braniff, Delta, Eastern; DFW-MIA – American, Braniff, Eastern; DFW-MCO – Braniff, Delta; DFW-TPA – American, Braniff, Delta; and DFW-PBI – Braniff. The intra-Florida markets are, of course, served by scalds [sic] of schedules.

[10] Such as the incorporation of Air Florida's intrastate service into its interstate certificate under the Deregulation Act.

[11] For example, the Board has granted many carriers operating authority between Miami and Fort Lauderdale. Orders 78-8-192, 78-11-53, 79-2-42 (80 C.A.B. 406).

[12] Exs. AF-D-100 to AF-D-102.

[13] Hereafter referred to as Tampa.

[14] Ex. AF-D-600.

among the points. As discussed previously, points included in Air Florida's proposed certificate for which it has presented no illustrative schedules (West Palm Beach, Orlando, and Jacksonville) will not be awarded in this case.

American's illustrative schedules[15] show round-trip service between Dallas/Fort Worth-Orlando-Fort Lauderdale and Dallas/Fort Worth-West Palm Beach, as well as one-way service Dallas/For [sic] Worth-Orlando-West Palm Beach and Orlando-Dallas/Fort Worth. American's proposed certificate,[16] like Air Florida's, suggests a linear route description, which will be adopted (Dallas/Fort Worth – Fort Lauderdale – Orlando – West Palm Beach), and it also includes points for which no illustrative schedule has been presented (Tampa and Miami), which will not be awarded in this case.[17]

Braniff's illustrative schedules[18] show round-trip service between Dallas/Fort Worth-Orlando-West Palm Beach, Dallas/Fort Worth-Orlando-Miami, and Dallas/

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[15] Ex. AA-200.

[16] Ex. AA-600.

[17] See previous discussion of Air Florida. American's illustrative schedules show service between Tampa-West Palm Beach, Orlando-Miami, and Miami- Tampa, but these are for Houston service, not Dallas/Fort Worth, as required by the Board. As noted previously (n. 9), American now operates Dallas/Fort Worth-Miami and Dallas/Fort Worth-Tampa.

[18] Ex. BI-200.

Fort Worth-West Palm Beach-Miami. Like the two previous carriers, Braniff proposes a linear route description[19] which will be adopted (Dallas/Fort Worth – Miami – Orlando – West Palm Beach), and points not included in its illustrative schedules (Tampa, Jacksonville, and Fort Lauderdale) will not be awarded in this case.[20]

Continental's illustrative schedules[21] show round trips between Dallas/Fort Worth-Fort Lauderdale-Miami, Dallas/Fort Worth Jacksonville-Tampa, Dallas/Fort Worth-Miami, Dallas/Fort Worth Orlando-Fort Lauderdale, Dallas/Fort Worth-Tampa-Orlando, and Dallas/Fort Worth-West Palm Beach-Miami. Continental's linear route description[22] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

Delta's illustrative schedules[23] show round trips between Dallas/Fort Worth-Miami, Dallas/Fort Worth-Fort Lauderdale, Dallas/Fort Worth-West Palm Beach,

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[19] Ex. BI-211.

[20] Braniff already has authority to provide service between Dallas/Fort Worth and these three points; see n. 9, *supra*. Braniff's requested coterminalization of Miami and Fort Lauderdale on segments 8, 10, and 12 of its certificate for route 9 was granted by order 79-?? -42, (See n. 11, *supra*.) Its illustrative schedules in this case show no Fort Lauderdale service, but it may presumably tack Miami-Fort Lauderdale service onto authority granted here. Braniff has obtained authority in several of the markets in issue here under the unused-authority provisions of the Act.

[21] Ex. CO-D-201.

[22] Ex. CO-D-600.

[23] Ex. DL-200.

and Dallas/Fort Worth-Tampa. As for the other applicants, Delta's proposed linear route description[24] will be adopted (Dallas/Fort Worth – Fort Lauderdale – Miami – Tampa – West Palm Beach), excluding the points not included in the illustrative schedules (Jacksonville and Orlando).[25]

Eastern's illustrative schedules[26] show round-trip service between Dallas/Fort Worth-Jacksonville, Dallas/Fort Worth-Orlando, and Dallas/Fort Worth-West Palm Beach. Again, the linear route description[27] proposed by the carrier (Dallas/Fort Worth-Jacksonville-Orlando-West Palm Beach) will be adopted.

National's illustrative schedules[28] show round trips between Dallas/Fort Worth-Fort Lauderdale, Dallas/Fort Worth-Jacksonville, Dallas/Fort Worth-Miami, Dallas/Fort Worth-Orlando, Dallas/Fort Worth-Tampa, and Dallas/Fort Worth-West Palm Beach. Again, the proposed linear route description[29] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

North Central's illustrative schedules[30] show round trips between Dallas/Fort Worth and Fort Lauderdale,

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[24] Ex. DL-400.

[25] As seen in n. 9, *supra*. Delta already has authority to and does operate between Dallas/Fort Worth and these two points.

[26] Ex. EA-101.

[27] Ex. EA-102.

[28] Ex. NAL-200.

[29] Ex. NAL-600.

[30] Exs. NCA-2 and NCA-3.

Jacksonville, Miami, Orlando, Tampa, and West Palm Beach, and Dallas/Fort Worth-Orlando-Miami. North Central's proposed linear route description[31] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

Northwest's illustrative schedules[32] show round trips between Dallas/Fort Worth-Miami, Dallas/Fort Worth-Orlando-Fort Lauderdale, and Dallas/Fort Worth-Tampa-Orlando. Its proposed linear route description[33] (Dallas/Fort Worth – Fort Lauderdale – Miami – Orlando – Tampa) will be adopted.

Ozark's illustrative schedules[34] show round trips between Dallas/Fort Worth and Orlando, Jacksonville and West Palm Beach, and Dallas/Fort Worth- Jacksonville-West Palm Beach. Ozark's proposed linear route description[35] (Dallas/Fort Worth – Jacksonville – Orlando – West Palm Beach) will be adopted.

Southern's illustrative schedules[36] show round trips between Dallas/Fort Worth and each of the Florida points, as well as round trips between each of the intra-Florida points. Its proposed linear route description[37] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville –

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[31] Ex. NCA-5.

[32] Ex. NW-201.

[33] Ex. NW-602.

[34] Ex. OZ-100.

[35] Ex. OZ-104.

[36] Ex. SO-101.

[37] Ex. SO-103.

Miami – Orlando – Tampa – West Palm Beach) will be adopted.

Texas International's illustrative schedules[38] show round trips in 16 nonstop and one-stop combinations involving all the Dallas/Fort Worth-Florida points. Its proposed linear route description[39] (Dallas/Fort Worth – Fort Lauderdale – Jacksonville – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

Western's illustrative schedules[40] show round trips between Dallas/Fort Worth and Fort Lauderdale, Miami, Orlando, Tampa, and West Palm Beach. Its proposed linear route description[41] (Dallas/Fort Worth – Fort Lauderdale – Miami – Orlando – Tampa – West Palm Beach) will be adopted.

The route awards being made will provide a wide variety of service opportunities, with each carrier emphasizing different market combinations and types of service.

ENVIRONMENT, ENERGY, AND LICENSE FEES

On March 16, 1979, the Bureau of Pricing and Domestic Aviation filed a notice of environmental rejection, finding that any subsequent action by the Board on the applications herein does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of

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[38] Ex. TXI-200.

[39] Ex. TXI-600.

[40] Ex. WA-1.

[41] Ex. WA-4.

the National Environmental Policy Act of 1969. That finding is hereby adopted.

The carriers' estimates of their annual fuel consumption (in gallons) are as follows:[42] Air Florida, 6,415,600; American, 9,465,000;[43] Braniff, 8,014,000; Continental, 13,974,000-15,306,000; Delta, 9,327,000; Eastern, 6,605,578; National, 26,809,164; North Central, 11,169,000; Northwest, 6,846,000; Ozark, 6,056,400; Southern, 14,162,259; Texas International, 30,492,856; and Western, 11,957,760.

The total is over 160 million gallons. In view of all the services already provided and with only a little over a million true O&D passengers in all these markets in the year ended June 30, 1978, there is no possibility that all the carriers will operate all the flights shown in their illustrative schedules. Additional fuel consumption as a result of the awards made here will thus undoubtedly be considerably less than that projected. On the other hand, it will also probably be substantially in excess of the 10-million-gallon threshold defining a major regulatory action in the Board's regulations.[44] However, on a record

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[42] Exs. AF-D-105, AA-292, BI-209, CO-D-202, DL-300, EA-101, NAL-201, NCA-4, NW-603, OZ-101, SO-102, TXI-601, and WA-3.

[43] Includes only those operations granted herein.

[44] In recent orders the Board has apparently changed its interpretation of the Energy Policy and Conservation Act. Rather than considering the total additional fuel consumption that may result from its regulatory action, the Board now considers the additional fuel consumption of each applicant separately in determining the 10-million-gallon threshold (Compare, for example, -Atlanta Route Proceeding, 79 C.A.B. 266, 270 (1978), with Service to Birmingham Proceeding, 81

devoid of evidence of public benefits, as is this one, it is not possible to make the findings required by 14 CFR 313.6(a). Nevertheless, the Board has always, as far as this judge is aware, found that, whatever the fuel consumption may be, the public benefits of multiple awards outweigh any increase in fuel usage.[45] That conclusion is adopted here.

There being no evidence with respect to increase in annual gross transport revenues, no determination as to license fees can be made.

An appropriate order and amendments to the carriers' certificates are attached.

[The proposed order and amendments referred to here are omitted since they are superseded by those printed *supra*].

PART II

Love Field may not be designated by the Board as an airport for interstate service at Dallas/Fort Worth. The application of Air Florida to use Love Field in interstate service is denied.

C.A.B. 843, (1979) and Dallas/Fort Worth- Cincinnati-Nonstop, 81 C.A.B. 848, (1979).) Following that approach, 6 of the 13 applicants herein project more than the threshold amount of fuel usage.

[45] *See*, for example, Transcontinental Low-Fare Route Proceeding, 80 C.A.B. 11, 34-36 (1979).

BACKGROUND

The history of this proceeding up to this time is given above on pages 803-806 of part I of this initial decision, served on April 19, 1979. That decision found all the applicants to be fit, willing, and able (pp. 806-808); granted each applicant authority to provide service between Dallas/Fort Worth Regional Airport and the points for which it had presented illustrative schedules in evidence (pp. 809-811); made the required findings as to environment at Dallas/Fort Worth and energy (pp. 811-812); and reserved for this part II the decision as to Air Florida's request to use Dallas Love Field in interstate operations (pp. 814-816). By order 79-5-231 served June 4, 1979, the Board affirmed the awards made in part I of this initial decision and permitted the filing of illustrative schedules by those carriers whose applications were denied in part.

Briefs regarding the Love Field issue were filed on May 17, 1979, by applicants Air Florida and American, the Dallas/Fort Worth Parties, the Bureau of Domestic Aviation (BDA), and intervenor Southwest Airlines.[1] As noted in part I, the same issue has been tried separately before Judge William A. Kane, Jr., in docket 34582, who received briefs on the same day. In an order dated June 11, 1979, this judge announced that she would consider in deciding this part II the additional evidence presented in docket 34582 as an extension of the evidence in this case and the briefs of the parties in that case on the same

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[1] Statements of position were filed by Air Florida, Ozark Air Lines, BDA, Broward County, San Antonio, TAC, Richard J. Sullivan, and Congressman William H. Harsha.

issue. Additional parties filing briefs therein are Frontier Airlines, the U.S. Department of Transportation, the Texas Aeronautics Commission (TAC),[2] the Bureau of Consumer Protection (BCP), and Thomas A. Neddy.[3]

FINDINGS AND CONCLUSIONS

In the State of Texas, the neighboring cities Dallas and Fort Worth have been economically competitive from early days. That rivalry continued as air transportation developed in the United States: 'For many years the Cities of Dallas and Fort Worth were engaged in a fierce, intense and sometimes bitter rivalry for the business of commercial aviation and commercial air carriers.'[4] In the midfifties of this century, increased use of Dallas Love Field by interstate carriers threatened the continuing viability of Fort Worth's newly built Greater Southwest International Airport (GSIA, then known as Amon Carter Field). The two airports were about 12 miles apart, and considerable sums of money were being committed by each city to gain traffic for itself at the expense of the other. In late 1955 Fort Worth requested that the Civil Aeronautics Board conduct a proceeding to determine adequacy of service to Fort Worth, and the Board instituted an investigation in February 1956.[5] The Board initially found in 1958 that service at Fort Worth was not

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[2] TAC was a rule 14 participant in this case and a rule 15 party in docket 34582.

[3] A rule 14 participant in docket 34582.

[4] *City of Dallas, Texas v. Southwest Airlines Company*, 371 F. Supp. 1015, 1019 (N.D. Tex. 1973).

[5] Order E.-10003.

inadequate;[6] but it subsequently reopened the record and ordered an upgrading of service in 1960,[7] only to reopen the record again a year later for further hearing.[8]

This was, of course, the era in which basic technological changes were taking place in commercial aircraft. And it was at about this time, in 1961, that the FAA and the CAB issued a joint public statement urging the development of regional airports to serve adjacent communities in order to save money and improve service, which the FAA said would be 'an increasingly important factor in considering applications for federal funds for airport construction.'

On August 20, 1962, the Civil Aeronautics Board instituted the Dallas-Fort Worth Regional Airport Investigation, one of a series of investigations relating to consolidation of air services for specific areas at a single airport, consequent upon the greatly expanded capacity in new high-performance jet aircraft. The reason for instituting the particular case at that time was that the Board had 'recently been apprised of the intention of both of these communities to invest substantial funds to meet the anticipated needs of increased air carrier services at airports which are only 12 miles apart.'[9]

It is very clear from the docket in the DFW Regional Airport case (encompassing 22 volumes of exhibits and testimony) that the Cities of Dallas and Fort Worth were

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[6] Fort Worth Investigation, 27 C.A.B. 260 (1958).

[7] Fort Worth Investigation, 31 C.A.B. 803 (1960).

[8] Fort Worth Investigation, 33 C.A.B. 479 (1961).

[9] Docket 13959, order E-18719.

at swords' points throughout the entire proceeding, which included 25 days of cross-examination between July 8 and September 19, 1963. Fort Worth favored the designation of its GSIA as the regional airport. Dallas took the position that the Board had no authority to require service for the two cities at a single airport but that, if the Board should nevertheless determine to do so, the airport should be Love Field. The Bureau supported Fort Worth's position, and the other parties (carriers and FAA) were divided on the issues as to whether a single airport should be designated and, if so, which airport should be selected.

The FAA participated extensively in that proceeding. In testimony submitted on June 26, 1963, its chief policy witness asserted that 'the Administrator of the FAA has been designated by the Congress as the Federal authority on the suitability of the location of civil airports and their capability to serve the needs of civil aeronautics safely and efficiently.' It was the opinion of the FAA that –

* * * because of its physical limitations, because of the intensely developed and highly valuable property surrounding Love Field; because of the obvious fact that any further lengthening of the runways at Love Field would serve merely to compound the aircraft noise problem, and for other equally good reasons, it appears that Love Field cannot be developed economically into the type of facility needed to serve the future requirements of this area. It follows, therefore, even if the Greater Southwest International Airport did not exist, the appropriate local officials would be well advised to consider a plan to develop a more adequate air carrier airport in any event.

Although the FAA did not consider Love Field to be unsafe, its representative said:[10]

At Love Field, the close-in portion of all approach areas to all runways is over either residential, commercial, or industrial areas which are densely populated. The FAA has imposed restrictions to make these operations equal to the established minimum safety requirements. It is clear, however, tht [sic] safety to the occupants of an aircraft and to the people on the ground is infinitely greater if the approaches to the airport are clear and the path that the aircraft is required to fly is not over highly populated areas. Accident statistics show that during the period from 1955 through 1962, 11% of air carrier accidents occurred within 5 miles of the approach end of the runway. More than half of this 11% occurred within 1 mile of the approach end of the runway. It is apparent that an accident of this nature at Love Field would be catastrophic.

Indeed, the FAA Administrator, Najeeb Halaby, is reported to have 'issued an ultimatum to the City of Dallas that, because of the obsolete nature of Love Field, its inadequacies, the FAA would not put another penny into the development of Love Field until the cities got together and developed a single airport to serve that area.'[11]

After the filing of briefs in December 1963, Judge Ross I. Newmann's initial decision was served on April 7, 1964. Upon consideration of all the facts of record and the

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[10] Docket 13959, written testimony of FAA, pp. AA-3-9.

[11] Docket 34582, tr., p. 137.

arguments of the parties, Judge Newmann concluded that it would not be in the public interest to designate either GSIA or Love Field as a regional airport to serve the Dallas-Fort Worth area.

In the case of GSIA, there would be little or no improvement over existing air services. Savings to the air carriers, the communities, and the Government would be outweighed by the additional costs involved. * * * While Love Field can meet the area's current needs and its needs for the immediate future, its expansion capability from a long-range standpoint presents an extremely serious problem. In short, Love Field's time is running out.'

The judge suggested that solution to the airport problem lay in voluntary cooperation between the two cities to establish a supplemental airport to serve the north Texas area.

Dallas, which apparently intended to continue operating Love Field in addition to any 'supplemental' airport, agreed with the judge; but Fort Worth asked the Board to overrule him and designate GSIA. During May, there was some skirmishing for position between the two cities as to which was the most cooperative; however, the Bureau expressed the view that 'there is no realistic possibility of agreement without Board compulsion.'[12] On brief, the Bureau urged the Board to designate GSIA, but stated that, if the Board wanted to allow the cities 'one more chance,' it should limit the time allowed and 'make

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[12] Docket 13959, vol. 20, repy of Bureau filed May 28, 1964.

clear that it will, on the basis of this record, designate an area airport if the cities cannot reach such agreement.'

After receiving briefs and hearing oral argument, the Board on September 30, 1964, apparently in agreement with the Bureau's assessment, issued an order in which it stated that 'the Board is now of the unanimous opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental cargo and passenger services,' and continued:[13]

Before proceeding to the entry of a formal decision in this case, the Board believes that it is in the public interest to afford the interested communities a final opportunity to arrive at a voluntary solution as to the location of the airport to be designated and the steps that should be taken to achieve this result at a reasonable time in the future. We have faith and confidence that the cities of Dallas and Fort Worth can arrive at a fair and equitable solution of this problem and we therefore have decided to give the communities a period of 180 days within which to arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service and to submit such agreement to the Board. Although we are convinced that the determination of the airport through which the service shall ultimately be provided should be made without delay, we are aware of the practical difficulties involved in the transition to service through a single airport, and contemplate a voluntary arrangement for an orderly transfer that will be finally

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[13] Order E-21341.

effected no later than sometime in 1968. Should the parties, contrary to our expectation, be unable to agree to designation of the airport to serve the area, the Board will then proceed promptly to issue a decision.'

No agreement having been reached, near the end of the 6-month period Dallas requested a 2-1/2-month extension of time, claiming that 'great strides have been made towards a mutually acceptable settlement.' The motion was opposed by Fort Worth 'because it has come to the reluctant conclusion that there is no prospect for a voluntary agreement under the present method of conducting negotiations between representatives of the two cities.'

The Board decided it should 'assist' the cities in their efforts to reach a 'voluntary' agreement. By an order issued April 13, 1965, the Board said that, 'if an agreement cannot be reached we will, because of the public interest considerations involved, take appropriate steps to issue a final decision in this proceeding.' Then it said:[14]

Since Fort Worth feels there is no prospect for a voluntary agreement under the present method of conducting the negotiations between representatives of the two cities, we will remand this case to the Examiner who will have full authority to assist the parties in their efforts to reach a definitive agreement, to make any such agreement part of the official record in this proceeding, and to enter an appropriate order terminating the investigation. In the event settlement cannot be effected, the examiner shall reopen the record to receive (1) evidence showing

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[14] Order E-22028.

the areas of agreement and disagreement and (2) further evidence on the question of Fort Worth's ability to finance a regional airport. This will provide the Examiner and the Board with a complete evidentiary record upon which a decision can be based.'

Judge Newmann was sent back to Texas. Before the end of May, Dallas and Fort Worth filed a memorandum of understanding which was unanimously approved by their City Councils. The cities agreed to support a State constitutional amendment to be submitted to the voters in November 1966, legislation enabling a joint airport authority, and a favorable vote by the taxpayers of the two counties to join the airport authority. In the meantime, they undertook to obtain promptly the services of an independent consultant to study and recommend the site, size, and configuration of a regional airport to be located between Dallas and Fort Worth; to acquire land; and to 'proceed immediately to establish an interim organization with power to take initial steps to insure the expeditious planning, financing, and construction of the regional airport, the construction to be completed and operational by 1971 but in no event later than 1973.'[15] As the district court said,

Serving two airports which were so close together resulted in unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities. Happily, the two cities have no [sic] joined hands and are well on the way to the construction of what promises to be he finest airport in the world.

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[15] Memorandum dated May 28, 1965, filed in docket 13959.

* * * This congenial alliance was not exactly the result of shotgun edding [sic] but more than a gentle nudge was provided by the Federal Government's Civil Aeronautics Board.[16]

The interim Dallas-Fort Worth Regional Airport Board was established in September of 1965, and necessary changes in the State law were made by 1967. However, creation of the Regional Airport Authority was defeated in the county elections in June 1967. The two cities therefore contracted and agreed on April 15, 1968, to continue the previously established Regional Airport Board to complete land acquisition and construction and to operate the airport.[17] Each city contributed initial capital and agreed that funds for completion of planning and construction would be obtained by issuance of revenue bonds and not by taxation. On November 11, 1968, the City Councils of the two cities adopted a concurrent ordinance authorizing the issuance of Dallas-Fort Worth Regional Airport joint revenue bonds.[18]

In adopting the ordinance, the cities stated that they had determined that their present airport facilities (Love Field and GSIA) 'are wholly inadequate to meet the foreseeable commercial aviation needs of the citizens of the Cities and the residents and citizens of the entire North Central Texas Region,' and that 'the most effective, economic and efficient means of providing needed airport

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[16] *City of Dallas, Texas v. Southwest Airlines Company, supra* at 1019-1020.

[17] Ex. DRWR-R-982 is the contract and agreement between the cities.

[18] Ex. DFW-R-983 is the ordinance.

facilities is the construction and equipment of a centrally located airport.' The cities gave up their ancient rivalry and adopted 'covenants against competition' in which each agreed, in pursuance of their common purpose, to put aside plans to compete with each other by promoting scheduled service at their solely owned municipal airports, principally Love Field and GSIA. Section 9.5 of the Board ordinance carried out this purpose for 'the optimum use and development of the Regional Airport':

Section 9.5. Competition, Optimum Airport Development.

A. It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA and Mecham Field own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport. It is further acknowledged and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities, each with respect to its own individually owned airport facilitates [sic], as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Mecham Field, of any and all Certificated Air Carrier Services, and to transfer such activities

to the Regional Airport effective upon the beginning of operations at the Regional Airport.

From time to time hereafter, the Board may review the effect and application of such covenant, and, by concurring action of not less than eight (8) of its members, the Board may reasonably limit its scope and effect and may waive its application in specific instances if it shall first determine that such action is necessary (1) in the interest of the public safety; (2) in the interest of prudent and efficient operations at the Regional Airport; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole. However, in order to promote, by voluntary agreement, the full use of the Regional Airport at the earliest practicable date by commercial air carriers, the Board shall be authorized to establish policies and to make uniformly applicable and nondiscriminatory agreements with air carriers regarding the instances, if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements. And in no event, by agreement with air carriers or otherwise, shall limitations or waivers of such covenant allowing a commencement or resumption of Certificated Air Carrier Services at any other airport or airports be adopted if the result thereof would be the reduction in Pledged Revenues below the amount required to satisfy the provisions of Section 9.4 hereof, unless the City (or the Cities in the case of more than one airport) shall also pledge to the payment of all Bonds, by

appropriate official action, such part of the revenues from the airport or airports to which such services are to be transferred, resumed or originally commenced, as will justly compensate the Regional Airport (at rates then in effect thereat for similar services), for the loss of such services and the gross revenues therefrom.

The Board's power under the paragraph shall not include the power to order or direct that specific Aircraft uses be placed at other specific airports unless the owner thereof shall consent to such action or unless such other airport is, or airports are, at the time subject to the control and jurisdiction of the Board.

B. In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and Facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the Board will undertake with regard to the Regional Airport, Love Field, GSIA, Mecham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and Facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished,

reduced or destroyed. It is provided, however, that nothing in this paragraph shall be construed to prohibit the promotion and full development of the operation of reasonable Aircraft uses (other than Certificated air Carrier Services) at Love Field, Redbird and Mecham Field, or Aircraft operations of any type at GSIA if the same shall ever be made a part of the Regional Airport. Otherwise, Aircraft uses at GSIA shall not be permitted after the Regional Airport becomes operational.

Revenues were to be obtained from the users of the airport; and, in accordance with the provisions of sections 9.4 and 9.5 of the ordinance, letter agreements were entered into in 1970 by the Dallas/Fort Worth Regional Airport Board and the eight certificated air carriers then serving Dallas/Fort Worth.[19] Each carrier agreed that, after the FAA had officially certified Dallas/Fort Worth Regional Airport as operational, it would move all of its certificated services to that airport and thereafter conduct such services at Dallas/Fort Worth Regional to the extent required by the bond ordinance and that it would, along with the other users of the airport, pay rentals, fees, and charges required to maintain and operate the airport plus 1.25 times the debt-service requirements on the revenue bonds, and an amount equal to any other obligations required to be paid from the airport revenues.[20]

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[19] American, Braniff, Continental, Delta, Eastern, Frontier, Ozark, and TXI.

[20] Ex. DFW-PH-1 is a typical letter agreement. Later signatory carriers executed airport use agreements, an example of which is ex. DFW-PH-2 which sets forth the terms of airport uses and charges and rights of the parties with more particularity.

The carriers also agreed to cooperate in the planning, development, and operations of the airport. Thus, the Airport Board, the FAA, and the carriers developed the master plans for construction and operation of Dallas/Fort Worth Regional Airport and air traffic control for the North Central Texas area. During that time of planning – and, indeed, for 14 years from 1965 to 1979 – the Regional Director of the FAA for the southwest region was Henry L. Newman.[21] According to Mr. Newman, the plans:

> * * * provided for all scheduled air carrier service by large turbojet aircraft to be at DFW and a system of satellite airports to provide adequate service for general aviation pilots. * * * This provides a natural separation to the greatest degree possible of the high performance and generally lower performance aircraft. Procedures were then established to effect this natural separation, thereby resulting in the most efficient use of the airspace with a system which could handle maximum traffic with minimum delays to all concerned. Substantial energy savings result, as well as a substantial reduction in noise. Environmentally the plan is ideal.'[22]

The master plan for Dallas/Fort Worth Regional Airport was a design not only for 'the finest airport in the world' at the time but also for the far future:[23]

> The primary purpose of the Dallas/Fort Worth Regional Airport is to provide an adequate facility to accommodate the ultimate domestic and international air

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[21] Mr. Newman had been employed by the FAA since 1946.

[22] Ex. DFW-917, p. 1.

[23] Ex. DFW-915.

transportation demand of the two cities, their eleven surrounding counties and the states that constitute their tributary market region. The airport is also designed to serve as an international port of entry to the United States.

Of the many factors considered in planning the airport, the most important one was that of air-space capacity. Studies of air-space saturation beyond 1985 indicated that the Dallas/Fort Worth Airport and its eighty nautical-mile airspace could sustain an ultimate annual enplanement demand in excess of 150 million passengers without the delays currently being experienced by other U.S. airports in a saturated condition.

The second basic factor in planning the airport was that of expansion capability. It was determined that even though airspace conditions would be excellent for growth, the airport itself must have the ability to grow. As a consequence the airport is designed to grow as demands for service grow. It is a completely expansible airport from all standpoints. Passenger terminals, runways, road access, cargo hangars and all other facilities can be added as needed. The space (17,520 acres) for such expansion has been acquired and the design of the facilities is such that additions are possible for all conceivable purposes.

Based on aeronautical, technical, economic, social and environmental criteria, airport planners developed a schematic airfield layout responsive to site physiography, weather, navigation standards, air-space conflicts, and compatibility of housing and institutional land-use to noise envelopes. * * * Airfield standards for runway/

taxiway widths, lateral separation, clear zones and other dimensional criteria were designed in accordance with Federal Aviation Administration Manuals. However, at the request of FAA officials, the minimums were upgraded to comply with what the FAA anticipated would be new rules. (For example, the runways were laid out to a width of 200 feet versus FAA requirements of 150 feet.)

The airport layout consists of extensive acreages, including space for six runways, their supporting taxiways, and apron space in the passenger maintenance and cargo areas. The airport layout has been designed to include four primary north-south runways and two secondary crosswind alignments. * * * During initial construction only three of these runways, the two inboard primary north-south alignments and the east crosswind, were provided. * * * The other runways and taxiways will be added to accommodate future demand.

Initially, the north-south primary instrument runways are 11,400 feet long and 200 feet wide. However, at ultimate configuration they will function as inboard takeoff runways capable of expansion of 13,400 feet. The outboard north-south runways will be expandable to 20,000 feet should evolving aircraft technology require such lengths. The crosswind runway is 9,000 feet long and is expandable to 11,000 feet.

A twin crosswind runway was planned for the west side of the airport. The six ultimate runways are designed to provide maximum capabilities for simultaneous takeoffs and landings under instrument conditions. Ultimate

capacity of the airfield has been estimated in excess of 175 IFR operations per hour.

Runway pavement measures 18 inches thick, although apron paving thickness varies with the specific aircraft mix using each terminal. Pavement is designed to permit overlays of up to two million pounds for future aircraft design.

The final airfield design provides 600 foot taxiway and runway separations required to accommodate the wingspan and fuselage length of aircraft anticipated in the future. The taxiways are able to accommodate aircraft flow volumes entering and exiting the runways and the terminal aprons without conflicts and delays. The capacities and turning radius provided by the taxiway geometry also expedites ground aircraft flow and will accept future aircraft types. Taxiways measure 100 feet in width. Concrete pavement thickness of the taxiways range from 15-inches to 18-inches, with provision for structural overlays as needed in the future.

The semi-circular terminals allow aircraft to dock at their gates under their own power, and push out assisted by apron tugs without obstruction from other aircraft. The building configuration and apron layout permit smooth, tangential flow of aircraft. The apron layouts at the terminal modules also enable anticipated future aircraft larger than the present B-747-200 equipment to operate on the same pavement. Apron area for the initial four terminal modules totals approximately 800,000 square yards. * * *

The airfield geometry was conceived to permit complete operations capability under both Category II and

ultimately the demanding Category III capability, with landing and takeoffs under zero ceilings and Runway Visual Range limits of 700 feet. Studies revealed that such weather minimums occur so seldom in the Dallas-Fort Worth region that the Airport can expect 100 percent all-weather capability, barring any major climatological changes.

The arrangement for moving all certificated service to the Regional Airport and employing the local airports for general aviation also created a unique opportunity for FAA to design an area air-traffic system for the future. The kind of traffic problems experienced at other urban-area airports would be avoided by advance planning. Former Regional Director Newman has been 'involved in the organization of the airport system plan and the air traffic system plan since its initiation' and is 'personally knowledgeable of many of the factors that are pertinent.'[24] The FAA participated in the site selection for the airport, and the area airport system plan was 'an FAA project, participated in by all the users of the system.' 'We had input from pilots. We had input from the ATA, and all of our professionals. It was the air traffic controllers, the flight standards specialists, and the engineers that designed and installed the navigation.'[25] At the hearing in this case, Mr. Newman described the air navigation system developed for the Dallas-Fort Worth area:[26]

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[24] Tr., p. 43.

[25] Tr., p. 136.

[26] Tr., pp. 52-54.

This is unique, Problems in other cities have developed as air traffic has grown over airports that were already there. In 1965, when it was decided to proceed with DFW at the insistence of the federal government incidentally and the CAB and the FAA literally forced the cities to build an airport or to get a single airport to serve the air carrier traffic. It provided an opportunity to develop a system without the restrictions and inhibitions that already existed.

FAA had the capability and conducted a simulation study at Atlantic City at its Aeronautical Center at a cost over 4(?) million dollars to develop the ideal air traffic control system for a new airport in a new area, an undeveloped area from the standpoint of aviation activity. * * *

The satellite airports were a very definite consideration in the simulation which was conducted. And the route structures which were laid out are being adopted now other places. What is fundamentally involved are four corner posts at four points around the 40 miles out from DFW.

So that all the traffic, the instrument, the IFR traffic, is funneled over those corner posts and then fed into the satellite airports as well as DFW, and Love Field. It permits for instance, it has almost entirely eliminated holding patterns for the DFW and that area; there is no such holding as far as the satellites. But what it permits is that any delays in the system are taken before they reach the corner posts; in other words they are taken in the en route environment where the aircraft, the jet aircraft, are at the higher altitudes. It saves energy, it reduces noise,

and with the timing the computerized operation at the air route traffic control center, the delays are taken in the en route environment rather than a turnover so that when a pilot is coming into that area he is going to get time over one of these four corner posts. He is advised of what his time is and if it is necessary to slow him down before he reaches there, he is going to do it at the most efficient time for operation of the jet aircraft. The aircraft burn much more fuel at low altitudes than they do at high. It has eliminated all the low approaches coming into that area. * * *

Now this was possible in that area because we were staring [sic] with a new system. We didn't have the restrictions that are already built in in other places. The simulation study in Atlantic City made this possible to reconfigure and come up with an ideal arrangement.

On September 21, 1973, the Civil Aeronautics Board issued an order in which it recited the history of the Dallas/Fort Worth Regional case and said:

In its ultimate development the Dallas-Fort Worth Airport will have six primary instrument runways capable of three simultaneous operations, and a ground capacity of 230 passenger-aircraft gates and 200 all-cargo gates. Under Phase I, which is to be opened this fall, the Dallas-Fort Worth Airport will provide a three-runway layout capable of simultaneous aircraft operations, with a total of 66 passenger gates and 12 cargo gates. Phase I cost is estimated at approximately $700 million.

Stating that 'the new Dallas-Fort Worth Airport will provide an adequate facility to accommodate the air transportation needs of Dallas and Fort Worth and the

surrounding counties the constitute their tributary market-base region,' the Board found that 'the primary purpose and objective of this investigation has been accomplished' and terminated the investigation.[27]

The Board having thus reneged on its part of the bargain to require service at the Dallas/Fort Worth Regional Airport, the parties who had acted in reliance thereon were quite naturally rather upset. As Delta said in answer to the joint petition for reconsideration filed by Dallas and Fort Worth,

The Cities made painful but statemanlike compromises to comply with the Board's determination that the public interest required service through a single airport. They and the carriers relied on that determination and have undertaken the awesome financial responsibility involved in providing a facility which will meet all present and reasonably foreseeable requirements.'[28]

Because of the recent commencement of intrastate jet service at Love Field by Southwest Airlines, that carrier's principal competitors, Braniff and TXI, opposed the Board's requiring all service to be provided at Dallas/Fort Worth Regional, while American, Continental, Delta, and Eastern supported the position of the Cities of Dallas and Fort Worth.

At midnight on January 13, 1974, the air carriers moved their services to Dallas/Fort Worth Regional Airport. GSIA was thereafter closed altogether. For 4 years

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[27] Order 73-9-82.

[28] Docket 13959, answer filed Oct. 10, 1973.

after Dallas and Fort Worth had petitioned for reconsideration of its last order, the CAB remained silent. Finally, on October 13, 1977, the Board served an order noting that the regional airport had been completed and 'has accommodated all certificated carrier flight into the Dallas-Fort Worth area,' tentatively concluding that the issues raised by the petition were 'no longer of concern,' and proposing to deny the petition for reconsideration as 'the most logical course of action at this time.'[29] Only Fort Worth excepted to the proposal; and, on January 12, 1978, the Board served order 78- 1-38 (75 C.A.B. 846) terminating the investigation, stating that 'the harm predicted by the petitioners has failed to materialize and we can foresee no reason why it would materialize in the future.' The Board's crystal ball was partly cloudy that day. Within months the reactivation of Love Field as an airport for interstate operations had arisen as an issue in at least five separate cases before the Board.

In the meantime, the Congress had before it proposals to amend the Federal Aviation Act of 1958. Among other things the Airline Deregulation Act that was finally enacted changed the factors listed in section 102 that Congress requires the Board to consider as being in the public interest and in accordance with the public convenience and necessity. In paragraph (6) of section 102(a), Congress declared to be in the public interest and in accordance with the public convenience and necessity in interstate air transportation.

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[29] Order 77-10-36.

The encouragement of air service at major urban areas through secondary or satellite airports, where consistent with regional airport plans of regional and local authorities, and when such encouragement is endorsed by appropriate State entities encouraging such service by air carriers whose sole responsibility in any specific market is to provide service exclusively at the secondary or satellite airport, and fostering an environment which reasonably enables such carriers to establish themselves and to develop their secondary or satellite airport services.

On September 21, 1978, this amendment was discussed extensively on the House floor and explained by Congressmen Wright, the Majority Leader of the House; Anderson, the Chairman of the subcommittee that drafted the Act; Snyder, the ranking minority member of that subcommittee; and Harsha, the ranking minority member of the parent Committee on Public Works and transportation:[30]

Mr. Wright. Mr. Chairman, I take this time in order that we may make some legislative history that will be clear to any and all who may undertake to administer this act.

'I refer to the new section 8 which has been inserted in the bill by the amendment offered by the gentleman from Illinois (Mr. Fary). It refers to the encouragement of air service in major urban areas through secondary or satellite airports where consistent with regional airport plans of regional and local authorities. I emphasize the

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[30] 124 Cong. Rec. H10293-10294 (daily ed. Sept. 21, 1978).

operative phrase, 'where consistent with regional airport plans of regional and local authorities.'

That is a concept which I certainly support. Situations and local desires vary widely throughout the country, and the needs and priorities of local authorities must by all means be respected. I know there are areas in the country such as Chicago and other localities where the local and regional authorities desire to get more service at satellite airports. There are, however, situations in this Nation which are exactly the reverse, and my purpose here is to give the Members one such illustration to make it abundantly clear to all for all time to come what this means with regard to them.

As the members of the committee are aware, I am sure, the cities of Dallas and Fort Worth, at the urging of the CAB, formally agreed that Love Field, as well as Mecham Field, the first in Dallas and the second in Fort Worth, would be closed to interstate and foreign flights as a part of their agreement to build and invest in the Dallas-Fort Worth Regional Airport. Based on that commitment, well over $500 million has been spent to build and develop the Dallas-Fort Worth Regional Airport.

As I understand it, the 1968 Regional Airport Concurrent Board Ordinance of the two cities specifically contains a regional airport plan which absolutely precludes the use of Love Field or Mecham Field for interstate or foreign flights. I am insistent that this decision shall be respected and that nothing be done to place it in jeopardy.

Now, if the CAB were to be allowed nevertheless to certificate any service into Love Field, let us say, then

there would be a very serious concern that it could become a major air carrier airport once again, and that service would be drawn away from the Dallas-Fort Worth Airport into which all the cities' moneys and their futures have been pledged, to the serious inconvenience of Fort Worth passengers and also to the serious financial detriment of the cities of Dallas and Fort Worth and their ability to pay off the Dallas-Fort Worth Airport bonds. I want to leave no possibility that any future administration or board member could misconstrue any language in this bill as encouraging or permitting such a travesty.

Mr. Chairman, I refer once again to the language: The encouragement of air service at major urban areas through secondary or satellite airports where consistent with regional airport plans of regional and local authorities.

I should like to ask the manager of the bill, the gentleman from California (Mr. Anderson): Am I correct in understanding that if the Dallas-Fort Worth Regional Airport Board or the cities inform the CAB that any interstate service to Love Field is not in accordance with the plan of the 1968 Board Ordinance, and that they do not desire it, then the CAB could not certificate any such service to Love Field or to Mecham Field?

Mr. Anderson of California. Mr. Chairman, will the gentleman yield?

Mr. Wright. I yield to my friend, the gentleman from California.

Mr. Anderson of California. Mr. Chairman, my understanding of the language is as the gentleman stated it.

Mr. Wright. Mr. Chairman, I thank the gentleman.

Mr. Goldwater. Mr. Chairman, will the gentleman yield?

Mr. Wright. Yes, I yield.

Mr. Goldwater. Mr. Chairman, is it the purpose of this colloquy to make a point that the service offered between Fort Worth and Dallas shall only be at the Fort Worth-Dallas International Airport?

Mr. Wright. In regard to interstate and foreign flights, yes. Mr. Chairman, the purpose of the colloquy is to make abundantly certain that nothing whatever in this bill shall interfere with the determination of the cities of Dallas and Fort Worth, since they invested $500 million of their futures in the bonds that will be guaranteed by their citizens upon the premise and upon the decision, and upon the encouragement of the CAB, that the Dallas-Fort Worth Regional Airport shall be the only airport to serve interstate or foreign flights.

The Chairman. The time of the gentleman from Texas (Mr. Wright) has expired.

(By unanimous consent, Mr. Wright was allowed to proceed for 3 additional minutes.)

Mr. Goldwater. If the gentleman will yield further, it is not the gentleman's intention that we should abandon or destroy Love Field or perhaps other fields in the surrounding area, is it?

Mr. Wright. Let me say to the gentleman that no commentary that I have made could lead to that conclusion. The cities of Dallas and Fort Worth, in their mutual, joint efforts, decreed that, in exchange for their putting huge sums of money into the development of this regional airport, there will be no interstate or foreign flights from any of the other airports in that region. Everybody is happy with that. I just want to make clear that nobody misreads anything in this bill as an encouragement to put competing flights in interstate commerce into any other airport, because it would be seriously detrimental to the citizens and the taxpayers of the area:

Mr. Goldwater. I think it was abundantly clear. But I am certain that the gentleman recognizes that aviation travel, the evolution aspect of it, with commuter service and short-haul coming into being, that at some point in time, as long as it is compatible with the regional plan, perhaps Love Field, and other fields, might become once again an attractive place to land. It is not encouraging by the construction of another field.

Mr. Wright. I think what the gentleman fails to appreciate is that presently there are short-haul intrastate flights and many private flights going into Love Field and into Mecham Field. There will be a continuing need for those airports. Mecham Field is currently undergoing an expansion program. We have no objection to that. What we would seriously object to would be any act on the part of the CAB which certificate any interstate or foreign flights into any place other than Dallas-Fort Worth Airport to serve those two cities.

Mr. Snyder. Mr. Chairman, will the gentleman yield?

Mr. Wright. I yield to the gentleman from Kentucky.

Mr. Snyder. I thank the gentleman for yielding.

Mr. Chairman, I want to say this, in support of Chairman Anderson's response to the gentleman from Texas. During the full markup – and I mentioned this earlier – the gentleman from Illinois (Mr. Fary) offered an amendment similar to the one that the gentleman makes reference to today. And we recognized their problem at Midway. But we were also well aware of the situation at Love that the gentleman from Texas has laid out here, and our agreement with him was that we wanted to try to help his situation but under no circumstances did we want any language that might be interpreted to adversely affect the situation which the gentleman from Texas just described. It was with that understanding that the staff developed the language that the gentleman is making reference to and which we have earlier adopted today, and it was with that understanding, at least on this side of the aisle, that we were acceptable to the amendment.

I hope that clarifies my understanding.

Mr. Wright. Mr. Chairman, I will say to the gentleman that I am grateful to him for that clarification.

The Chairman. The time of the gentleman from Texas (Mr. Wright) has expired.

(On request of Mr. Harsha and by unanimous consent, Mr. Wright was allowed to proceed for 1 additional minute.)

Mr. Harsha. Mr. Chairman, will the gentleman yield?

Mr. Wright. I yield to the gentleman from Ohio.

Mr. Harsha. I thank the gentleman for yielding.

Mr. Chairman, I would also like to associate myself with the remarks of both the chairman of the subcommittee and the ranking minority member of the subcommittee. When the gentleman from Illinois offered his amendment initially. I was the one who raised the most objections to it, because at that time it was so worded that it may have impacted on some litigation that was presently going on. So as a result of that, I met with the gentleman from Illinois and two or three other members from Illinois and the members of our committee. With the assistance of the staff, we worked out what we felt was an acceptable amendment, recognizing the problem with Midway and O'Hare Airport and the problems there that those members from Illinois were concerned with. While at the same time I made a commitment with my good friend, the gentleman from Illinois, relative to this amendment, I also believe I had an understanding that it in no way was to have a detrimental effect on the Fort Worth-Dallas Airport.

That is my understanding of the legislative history of it, and I hope it will be so interpreted.

Mr. Wright. I thank the gentleman, and I am pleased and satisfied with the response.

Later, Congressman Johnson, the Chairman of the Aviation Subcommittee, explained:

The purpose of this amendment is to direct the CAB to take appropriate action to stimulate air service at so-

called secondary and satellite airports in major metropolitan areas – such as Chicago's Midway Airport, Baltimore-Washington International Airport, Oakland, Calif., Newark, N.J., and Toledo, Ohio – when such increased use is endorsed by local, regional, and State authorities.[31]

Five weeks after the conference report and over 2 weeks after the Act became effective upon President Carter's signing it, Senators Kennedy and Cannon inserted in the Congressional Record a question and answer apparently contradicting the House explanation.[32] Later, Congressman Wright testified as a witness in this case in March 1979; and letters from Congressman Harsha and from Richard J. Sullivan, Chief Counsel of the Committee on Public Works and Transportation, were accepted as statements of position under rule 14. All of these statements reaffirm the House view.

The Texas Aeronautics Commission in its brief in docket 34582 and Southwest Airlines in its brief herein both cite court cases that have persuaded the judge that all the post hoc interpretations cited in the preceding paragraph must be disregarded by the Board. The court decisions are very much to the point:

A legislature speaks through statutes, and, in cases where the statutes require interpretation, through committee reports and debates. No member of a legislature, outside the legislature, is empowered to speak with authority for the body. If he may testify voluntarily, other members of his legislative body with different views or

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[31] 124 Cong. Rec. H13447 (daily ed. Oct. 14, 1978).

[32] 124 Cong. Rec. S19559 (daily ed. Nov. 9, 1978).

different recollections may be summoned to give their differing versions. The debate, which, so far as the law-making body is concerned, should have been ended by the enactment of the statute, would be transferred to the court, with disturbing possibilities of embarrassment and friction.[33]

Statements made by legislators in debate can be a part of the legislative history which guides courts in statutory construction. * * * On the other hand, statements made by a legislator after enactment of a statute and not a part of the records of the legislative body are entitled to little or no weight at all. * * * Such statements are not offered by way of committee report and are not offered for response by other members of the law-making body. The intent which is helpful in interpreting a statute, is the intent of the legislature and not of one of its members. For purposes of statutory construction, a legislative body can only speak through a statute, with the words that are used in light of the circumstances surrounding its enactment.[34]

The opinions of some members of the Senate, conflicting with the explicit statements of the meaning of the statutory language made by the Committee reports and members of the Committees on the floor of the Senate and the House, are not to be taken as persuasive of the Congressional purpose.[35] The reports and explanations

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[33] *National School of Aeronautics v. United States*, 142 F. Supp. 933, 938 (Ct. Claims 1956).

[34] *Epstein v. Reeor*, 295 F. Supp. 214, 216 (N.D. Calif. 1969), *aff'd* 421 F.2d 930 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970).

[35] *U. S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942).

given by committee members in charge are appropriate guides to ascertain the meaning and purpose of the law-making body,[36] and later statements are entitled to little or no weight.[37]

In light of the circumstance surrounding enactment of section 102(a)(6), the language of the statute itself, and the undoubted existence of the regional airport plans of the regional and local authorities, it seems clear that the Congress has forbidden the Board to certificate any future interstate air service at Love Field contrary to those airport plans. This is the position taken by the six Dallas/Fort Worth Parties[38] and their supporters.[39]

Nevertheless, Air Florida (one of 13 applicants herein) urges the Board to permit it to use Love Field in its Dallas/Fort Worth-Florida service. Air Florida is supported principally by the intervenor Southwest Airlines, who is the applicant in docket 34582, which has been heard by Judge Kane.[40] They argue that section 102(a)(6) is only 1 of 10 factors that the Board should merely

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[36] *Dupier Co. v. Deering*, 254 U.S. 443 (1921).

[37] *?? v. Colloway*, 526 F.2d 246 (8th Cir. 1975); *Sperling v. United States*, 515 F.2d 465 (3d Cir. 1973); *United States v. Mine Workers*, 330 U.S. 258 (1947).

[38] The City of Dallas, the City of Fort Worth, the Dallas Chamber of Commerce, the Fort Worth Chamber of Commerce, the North Texas Commission, and the Dallas Fort Worth Regional Airport Board.

[39] American, Eastern, Frontier, Ozark, DOT, Neddy, Wright, Harsha, and Sullivan, the latter three of which are disregarded, as noted previously.

[40] Others supporting Air Florida are BDA, BCP, TAC, and San Antonio. The other parties took no position.

'consider' 'among other things' in determining whether a route award is consistent with the public convenience and necessity, and leap from there to the conclusion that local authorities cannot 'veto' a Board decision to authorize service at a satellite airport.

Clearly, paragraph 6 is 1 of 10 paragraphs in which Congress set forth factors that the Board is required to consider as being in accordance with the public convenience and necessity. Just as clearly, it does not require that the Board encourage service at satellite airports in every case. Indeed, the 'encouragement' is limited by the statute itself to those cases where such encouragement is 'consistent with regional airport plans of regional and local authorities.'

As Air Florida says, the Board and the courts have held in the past that one or another of the 'factors' listed in section 102 may tip the scales one way or another in various cases. In some recent Board cases, such as those involving Midway and Oakland airports, the encouragement of the use of those satellite airports was the overriding factor considered; the cases were instituted for the specific purpose of certificating service at those satellites, and at the urging of local and regional authorities.

Here, on the contrary, paragraph 6 was injected into a broad case involving service between Dallas/Fort Worth and various points in Florida by 1 of 13 applicants, and service at the satellite airport is not 'consistent with regional airport plans of regional and local authorities.' There is no denying the existence of those airport plans. Yet, under the Air Florida argument, the Board would be

required to encourage service at Love Field by Air Florida, regardless of those regional airport plans, and contrary to its own argument that section 102 does not require the Board to do anything.

The 'balancing act' has already been done as to the policy factors in this case, and the Board has authorized service by the various carriers between Dallas/Fort Worth and the Florida points. One applicant in this case, Air Florida, and one in docket 34582, Southwest, argue that the Board must adopt their views and may not look at the legislative history, because the 'statute is plain and unambiguous on its face.' It certainly appears to the judge to be plain and unambiguous, but these same parties are the ones who would have the Board read out of the statute the plain and unambiguous language.

The lengthy explanations on the House floor during the debate upon this specific section of the bill also 'make it abundantly clear to all for all time to come what this means.' Where the statutory meaning is clear, legislative history cannot serve to reverse that clear meaning, as Southwest says. Here, the legislative history is quite in accord with the plain words of the statute. The Congressmen recognized that 'situations and local desires vary widely throughout the country,' and Love Field was given as a specific instance where the Board 'could not certificate any such service.' 'I want to leave no possibility that any future administration or board member could misconstrue any language in this bill as encouraging or permitting such a travesty.' 'What we would seriously object to would be any act on the part of the CAB which certificate any interstate or foreign flights into any place other than Dallas-Fort Worth airport to serve those

two cities.' The drafting process was described, and the subcommittee was 'well aware of the situation at Love' and 'under no circumstances did we want any language that might be interpreted to adversely affect the situation'; 'it in no way was to have a detrimental effect on the Fort Worth-Dallas airport.' Indeed, the only remarks relating to Love Field that may be contrary in the Congressional Record are the afterthoughts of Senators Kennedy and Cannon, which must be disregarded by the Board, as discussed previously.

If the Board should now take it upon itself to certificate interstate service at Love Field, it would simply fly in the face of the clear congressional intent. The remedy for those who do not like the statute as it is is not to twist it out of reason, but to petition the Congress to change it.

The fact is that, because paragraph 6 has been kept isolated from the other nine public interest factors in this case, Air Florida and Southwest claim that the Board has a sacred duty to enforce 'encouragement of air service at major urban areas through secondary or satellite airports,' no matter what the local and regional authorities may present to the contrary. It is Air Florida and Southwest who seek to make section 102(a)(6) an imperative rather than 1 of 10 enumerated factors that the Board must consider as being in accordance with the public convenience and necessity, among other things.

On the other hand, the six Dallas/Fort Worth parties ask the Board simply to read the words of the statute in their context and not to do what the Congress, from whom the Board derives all of its authority, has clearly told the Board not to do. In that context, it is clear that

Congress wished to give its approval to the Board's efforts to accommodate the Chicago-area authorities, who wanted to revitalize Midway Airport, for whatever reasons they may have had. Congress did not set forth the reasons why, as to Midway and the like, but left that to the local authorities. However, they did set forth the reasons why not, in affixing the limitation on such encouragement by the Board. Yet, Air Florida and Southwest would have the Board believe that the Board must encourage such use where the local authorities want it done and ignore the local authorities where they do not want it done.

In support of their arguments, Air Florida and Southwest cite several court cases involving Southwest's rights to serve Love Field in intrastate air transportation. Of course, as the courts said, the CAB had no jurisdiction over purely intrastate air transportation, nor over airports or cities, and the courts made clear that the cases were no precedent as far as interstate air transportation is concerned. More important, however, all those cases were decided before enactment of the Deregulation Act, in which Congress has delineated in this particular instance the demarcation between the use of Love Field and Dallas/Fort Worth for interstate air transportation. Congress has said that local and regional airport planning is in the hands of those who have made the plans and paid the price, not the Federal CAB. Cases decided before the Deregulation Act, particularly dealing with intrastate transportation, are simply not applicable to situations arising in interstate transportation after the enactment of the Act.

The Air Florida group use the word 'veto' to describe the congressional recognition of the primary interest of local and regional airport owners in planning for the use of their local airports. There is, of course, no veto power expressed or intended; the Congress has merely limited its own policy that use of satellite airports should be encouraged to those cases where local, regional, and State authorities have endorsed such encouragement. Where the airport plans of local and regional authorities do not include increased certification at satellite airports, the congressional policy is that the Board shall not encourage such use and certainly shall not force its whim upon the local authorities. If the statute does not mean this, then it has no meaning at all. Congress is not given to enacting absurdities.

The Air Florida group would in fact have the Board veto the act of Congress as well as the local ordinance. The Board cannot, of course, engage in such ultra vires activities as determining the legality or constitutionality of laws. The Board is a congressional agency and exercises only that power which is delegated to it by the Congress. It has no independent constitutional authority to do otherwise.

Yet, Air Florida's supporters would apparently argue that the Congress itself has acted in an unconstitutional manner. And BCP raises the specter of conspiracy in restraint of trade and abuse of process. These spurious arguments do no credit to those who put them forward. Congress and two Federal agencies, the CAB and the FAA, have put their imprimatur on the 'reasonable separation' of kinds of air traffic to be permitted at Dallas/Fort Worth Regional and its satellites and hence would

become coconspirators with the accused, the six Dallas/Fort Worth parties and the air carriers who support them, not to mention the U.S. Department of Transportation, which reads the statute as it is plainly written. Aside from the fact that it is not the Board's business to rule upon the legality of the statute it is directed to administer, the Congress cannot be accused of conspiracy when it enacts laws within its purview, the purposes of which are writ so large in the history of this particular controversy.

It is, after all, Congress which holds the purse strings and has the responsibility to see that public funds are expended in a rational way, in this instance for a national air transportation system to meet the present and future needs of the nation's commerce. The taxpayers of the United States do have quite a considerable stake in Dallas/Fort Worth Regional Airport. Air Florida and Southwest would have them invest much more to modernize Love Field, which Southwest's own witness in response to his own counsel called, 'a rundown facility' with 'very poor radar,' whereas Dallas/Fort Worth Regional has 'the very finest electronic equipment is in place, with a beautiful facility for their use.'[41] That same witness had attended some of the hearings in the Dallas/Fort Worth Regional Airport case and 'learned through osmosis' that 'the CAB told Dallas-Fort Worth that, either get together, decide on a regional airport, or we'll do something else,' and that the 'arm-twisting' was by both the CAB and the FAA.[42]

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[41] Docket 34582, tr., pp. 398-399.

[42] Docket 34582, tr., pp. 449-450.

The Air Florida parties argue that the airport plans that resulted from that arm-twisting are somehow wrong, that circumstances are different now, and Love field must be reactivated by Board fiat to relieve congestion in the Dallas/Fort Worth area. Not only is the planning of airports again outside the Board's jurisdiction, but the facts are not as alleged. No need whatever has been shown for traffic relief at Dallas/Fort Worth Airport by increasing traffic at Love. Dallas/Fort Worth, as described in detail previously, was designed for future expansion capability, has all the latest traffic-control equipment and facilities, and can handle all foreseeable traffic growth. According to Mr. Newman, 'it is the only major airport in the country that has got excess capacity.'[43]

In fact, the overwhelming evidence in both this case and in docket 34582 indicates that current capacity at Dallas/Fort Worth Regional Airport is limited chiefly by operations at surrounding airports – the main problem being caused by Love Field. For example, phase I of a recent FAA-sponsored study of capacity at Dallas/Fort Worth Regional found that:

Owing to the location and volume of air traffic generated at east-side satellite airports, current DFW runway capacity can be significantly reduced at any given time. * * * Operations at Love Field are a prime cause of this constraint, due to the volume and nature of air traffic generated there.

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[43] Tr., p. 118.

Accordingly, although current DFW runway capacity exceeds air traffic demand, aircraft delays are caused by constraints to the use of maximum available capacity.

In the future, DFW capacity can be increased significantly through the development of additional runways and the implementation of ATC Engineering & Development improvements. However, unless current constraints to DFW runway capacity are relieved, additional investment in runways way [sic] still not provide the capacity required to efficiently accommodate future air traffic demand volumes.

A determination of the cost of aircraft delay and excess fuel consumption caused by current constraints to DFW capacity will be made in Phase II of the Airport Improvement Program.[44] Love Field operations are now 91.5-percent general aviation; the only scheduled operations are intrastate and air taxi operations, in accord with the airport plans. But Southwest's intrastate flights with high-performance aircraft have increased dramatically in the last year, while other aviation activity was also growing. The fact is that increasing high-performance aircraft operations at Love Field would not lessen, but would aggravate air traffic congestion and potential safety problems in that terminal area.

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[44] Ex. DFW-903A, docket 34582. Dallas/Fort Worth Airport Improvement Program, phase I report: capacity analysis, final draft, April 1979, prepared by Dallas/Fort Worth Airport Board, Airlines Service Dallas/Fort Worth, Air Transport Association, and Federal Aviation Administration. This is one of a continuing series of FAA studies at selected airports. Dallas/Fort Worth was not on the original list of airports, because its capacity exceeds demand. Tr., pp. 116-118.

Air Florida's proposed service in this case would involve entirely new operations at Love Field, since Air Florida does not now serve Dallas/Fort Worth. In addition, Southwest in several cases is seeking new authority between Love Field and other interstate markets, and a number of carriers who do not now serve Dallas/Fort Worth have recently been authorized by the Board or its judges to serve that area without designation of the airport to be served. Even if no carrier now using Dallas/Fort Worth Regional Airport moved any of its operations to Love Field, reactivation of Love Field in these cases would increase congestion, noise, delay, fuel usage, air safety problems, and costs to users and taxpayers. As witness Newman said, 'The use of Love Field by large turbojet aircraft destroys the basic element of the plan. The mix of this traffic in the highly congested area east of DFW with Navy Dallas, Redbird, Love Field, and Addison is the basic thing the plan was engineered to avoid.'[45]

The airport plan is basic to this case and to the statutory scheme. It is important to remember that the limitation in section 102(a)(6) applies to future acts of the Board. It is not retroactive; no current operations at Love Field will be required to be moved from there, even though what was formerly intrastate transportation may have, by action of law, become interstate transportation. Neither Southwest's operations nor those of previously exempt air taxi operators are affected. But no further encroachment on the plan will be countenanced. The statute incorporates the status quo in order to protect the

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[45] Ex. DFW-917, p. 1.

reasonable separation of airport use insisted upon by the Federal Government, the investment of local and Federal taxpayers and the bondholders, the citizens who must bear the noise, and the passengers and shippers who are affected by delays and fuel waste and who pay the certificated carriers' costs.

Since Mr. Newman and other current and past FAA employees are principally concerned with airspace problems in the crowded sky around Love Field, which would be exacerbated by increased operation of high-performance aircraft there, rather than with whether those aircraft are engaged in interstate or intrastate service, the Air Florida group argue that separation of uses based on an interstate-intrastate dichotomy is unreasonable, discriminatory, a burden on interstate commerce, and a violation of other provisions of the Federal Aviation Act. The arguments center around the Federal-preemption section (105(a)(1)), the reserved proprietary rights provision (sec. 105(b)(1)), and the exclusive-use prohibition (sec. 308(a)).[46]

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[46] The pertinent parts of these three sections read as follows:

> 'Sec. 105(a)(1): Except as provided in paragraph (2) of this subsection [excepting intra-Alaska operations], no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this Act to provide interstate

These provisions simply have nothing to do with this case, which is concerned not with local rights but with a statutory limitation upon the Board's authority to certificate service to one of several available airports at a particular point. The arguments and assertions of Federal preemption and proprietary rights are irrelevant; nor is there any exclusive use.

Forced by CAB and FAA, Dallas and Fort Worth agreed in their ordinance for the 'phase-out at Love field, Redbird, GSIA and Meacham [sic] Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.' Certificated air carrier services were defined as scheduled CAB-certificated interstate and foreign service and TAC-certificated intrastate service. Air taxis, which were exempt from certification by the Board and which by Board definition operated small aircraft, could continue to operate

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transportation.

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'Sec. 106(b)(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

* * *

'Sec. 308(a) * * * There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.'

at satellite airports,[47] as could such nonscheduled interstate or intrastate operations as training, positioning, or maintenance flights, charter flights, and general aviation operations. The satellites were thus intended for use principally as general aviation airports; and, as noted previously, 91.5 percent of operations at Love Field are general aviation.

It is not up to the Board to question the reasonableness of that classification, which was, after all, brought about by its own actions. As the Court of Appeals said:[48]

In consequence of federal Civil Aeronautics Board hearings commenced in 1962, the cities were given to understand that, if they were unable to agree within a reasonable time on a single port for interstate air service to the Dallas-Fort Worth area, the CAB felt obliged to designate one.

The handwriting being thus upon the wall, the cities found themselves, after all, able to agree. In due course, and with CAB blessing and encouragement, they constructed a new airfield and persuaded all interstate, CAB-certificated carriers then serving the area to agree to move their services there.

The courts in the Southwest cases found that the Board's orders in the Dallas/Fort Worth Regional Airport case did not apply to intrastate air transportation, over

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[47] Ordinance, p. 5; ex. DFW-R-983, p. 6.

[48] *City of Dallas, Texas v. Southwest Airlines Co.*, 494 F.2d 773, 775 (5th Cir. 1974), *affg*, 371 F. Supp. 1015, rehearing denied, 496 F.2d 1407 (1974), *cert. denied*, 419 U.S. 1079 (1974).

which the Board had no jurisdiction and directed Dallas to permit Southwest to operate intrastate commuter flights at Love Field in competition with operations by air taxis and CAB-certificated carriers within the State. The ordinance was found to unjustly discriminate specifically against Southwest and to grant an exclusive use by excluding only Southwest's intrastate service from Love Field while permitting those other intrastate services. The courts did not question the validity of Board orders nor the Dallas/Fort Worth ordinance as they applied to the phase out of interstate certificated scheduled service at Love Field.

As noted previously, those cases have no application to the present situation, either factually or legally. There is no competition for certificated scheduled interstate service at Love Field, and nobody is being discriminated against nor excluded from a use permitted to others. Nor is there any burden on interstate commerce, with a futuristic airport available that was built for the specific purpose of accommodating certificated interstate scheduled service. Air Florida and Southwest would now have the Board change that classification just for their benefit. But by the recently enacted Deregulation Act, Congress has specifically prohibited the Board from doing so. The Board's authority is limited by Congress, not by Dallas and Fort Worth.

The question here is really very simple: whether the Board has authority to open Love Field to new interstate certificated service, which has not been permitted previously. The Congress has clearly said no. Yet, BCP imputes ulterior motives to the Dallas/Fort Worth Parties for 'resorting to the Board.' BCP's lack of knowledge of the

entire history of this case is thus revealed. Dallas and Fort Worth did not 'resort' to anything: they followed the statutory directive in response to Air Florida's proposal to institute interstate service at Love Field by informing this tribunal of the long-existing airport and air traffic plans for the north Texas region. That they must do in order to establish on the record that paragraph 6 bars the Board from certificating such service. The statute grants to the regional and local authorities – in this case the Dallas/Fort Worth Parties – the right to make their own determination, pursuant airport planning, as to which of several local airports they own and operate shall serve interstate air carriers. As DOT says on brief in docket 34582, 'Congress has adequately registered its intent that interstate service to this area be provided only through DFW- airport.' The Board is bound by that legislative directive.[49]

The Dallas/Fort Worth supporters argue additionally that the Board is equitably estopped from changing its longstanding policy because the cities and carriers have relied on that policy in good faith to their detriment. Fort Worth, of course, closed GSIA altogether. American says:[50]

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[49] In May, while this decision was being written, the Texas legislature passed a bill that would have withdrawn from Dallas its recognized authority to restrict service at Love Field under its airport plans for flights of 600 miles or less. (S.B. 772.) The bill was vetoed by the Governor of Texas on June 12, 1979, leaving the local authorities with their preexisting mights. The bill would not have affected this case in any event since the Dallas Fort Worth- Florida routes are all over 600 miles.

[50] Brief, p. 3.

Absent extraordinary factors of justification, the Board cannot abandon its commitment to the single airport concept at Dallas/Fort Worth just five years after the facility, constructed at a cost exceeding $1 billion, opened for business. No such factors are present here. And Frontier says:[51]

> * * * the Board cannot now deny its responsibility for the creation of the Regional Airport and cannot participate in actions which will undermine its successful operation. To do so by granting Southwest's application to institute interstate service at Love Field would be morally reprehensible, and nothing short of disgraceful behavior by a government agency.

Dallas/Fort Worth witness Downey, on cross-examination,[52] spoke of 'the years of time and the millions of dollars that have been spent' as well as 'all of the genius that has been applied in trying to plan for a rational air system in the metroplex.' And, later, he said:

> You've got problems of air space. You've got problems of city planning. You've got economic problems. You've got environmental problems. * * * We're talking about a major planning for a major area in the United States of air transportation that must have a fully contained plan. It must operate in accordance with the rules of the road. Otherwise, like any city whose planning goes to pot, it's going to deteriorate and become of no value to us whatsoever.

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[51] Docket 34582, brief, p. 7.

[52] Tr., pp. 300, 317.

The parties cite various court decisions on the subject. For example, the District of Columbia Court of Appeals has held that a Federal agency may change its policy, but it must give due consideration to equities arising out of commitments based on its previous rulings.[53] The court further says:[54]

* * * estoppel – preventing the alteration of prior practices as regards certain parties – will only be worked against the government for compelling equitable considerations. Previous CAB practice will only be determinative here if it had been such as to have created a pattern of behavior on which industry members justifiably had come to rely.

Without the 'cornerstone requirement of reasoned decision making,' 'administrative litigants and the public generally would be set adrift on a potential sea of unconscious preference and irrelevant prejudice.'[55] The agency has a right to modify or overrule established precedent and is not bound by rigid adherence to prior rulings, but it must be faithful and not indifferent to the rule of law. The Court of Appeals for the 10th Circuit says:[56]

The rule of law is intended to eliminate the appearance as well as the reality of arbitrariness, and if the

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[53] *Consolidated Gas Supply Corporation v. F.P.C.*, 520 F.2d 1176 (D.C. Cir. 1975).

[54] *British Caledoman Airways, Ltd. v. C.A.B.*, 584 F.2d 982, 986 (D.C. Cir. 1978).

[55] *Columbia Broadcasting System, Inc. v. F.C.C.*, 454 F.2d 1018, 1025 (D.C. Cir. 1971).

[56] *Id.* at 1027. *See also C.F. Lytle Co. v. Clark*, 491 F.2d 834, 838 (10th Cir. 1974).

public's faith in its administrative agencies is to be maintained, it is imperative that these agencies act in a wholly rational, logical fashion, completely free from even the appearance of bias, prejudice and improper influence.

And the Board itself recently invoked equitable principles with respect to a mere exemption:[57]

[W]e do not consider it equitable or consistent with the public interest to revoke the exemption granted TWA in the Orlando-Philadelphia and Minneapolis/St. Paul St. Louis markets. TWA has changed its position in reliance on the Board's order, has invested resources in its announced new services in these markets, and would be injured by the abrupt termination of its authority. If the order was justified when issued – and we think it was – Northwest's subsequent showing should not induce us to change our mind after TWA has acted in reliance. To revoke the exemptions now would penalize TWA without cause, and would deter other carriers from relying on the Board's grants of exemption authority.

American claims that the Board is bound to apply the same equitable principles here:[58]

The Dallas-Fort Worth Regional Airport was built in direct reliance on Board policy. The cities and affected carriers expended substantial resources in implementing that policy, and the carriers committed themselves by

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[57] *American et al., Unused-Authority Exemptions*, 80 C.A.B. 485, 490 (1979).

[58] Brief, pp. 20-21.

81 C.A.B. 798, 1979 WL 21406 (C.A.B.)

81 C.A.B. 798, 1979 WL 21406 (C.A.B.) [sic]

contract to use and support the new airport. They are entitled to the policy's continuation, absent an extraordinary showing that a reversal is required. There are certainly no circumstances presented now that could justify such a change.

Although the arguments in favor of equitable estoppel are probably correct in this case, there is no need to decide that question. The Board has already been estopped by an Act of Congress.

Nor is there any need to rule on the arguments of Dallas/Fort Worth and other parties that further environmental analysis is required by the National Environmental Protection Act and the Board's regulations to assess the cumulative impact before interstate service may be authorized at Love Field. Such service may not be authorized by the Board. It has already been ruled in part I of this initial decision that the certification of all the applicants for service at Dallas/Fort Worth Regional Airport did not constitute a major federal action significantly affecting the quality of the human environment, and the Board has affirmed that decision.

The application of Air Florida to use Love Field in interstate service will be denied. An appropriate order is attached.

[The proposed order referred to here is omitted since it is printed *supra*.]